2014); *Steinhilber v. Alphonse*, 508 N.Y.S.2d 901, 903 (N.Y. 1986). Even though a pure opinion is not actionable, a mixed opinion can be the cause of a defamation action. A "mixed opinion" is one which is "based upon facts which justify the opinion, but are unknown to those reading or hearing it…" *Davis*, 998 N.Y.S.2d at 136; *Steinhilber*, 508 N.Y.S.2d at 904. In terms of differentiating an actionable mixed opinion from a pure opinion, courts have stated that in a mixed opinion, "the implication that the speaker knows certain facts, unknown to [the] audience, which support [the speaker's] opinion and are detrimental to the person" being discussed…" *Davis*, 998 N.Y.S.2d at 136; *Steinhilber*, 508 N.Y.S.2d at 904.

Whether a statement is a fact or an opinion is a question of law for the courts and tends to be judged off the standard, "what the average person hearing or reading the communication would take it to mean." *Davis*, 998 N.Y.S.2d at 136-137; *Steinhilber*, 508 N.Y.S.2d at 904. In order to further distinguish a fact from a nonactionable opinion, courts in New York consider three different factors:

> "(1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to 'signal . . . readers or listeners that what is being read or heard is likely to be opinion, not fact."'

Davis, 998 N.Y.S.2d at 137; *quoting Brian v. Richardson*, 637 N.Y.S.2d 347, 350 (N.Y. 1995). The third factor is viewed as the most complex and mandates the court to not just look at the specific asserted claim, but to evaluate the communication as a whole and consider the tone and purpose of the entire statement. *Davis*, 998 N.Y.S.2d at 137. Courts have decided to read all the communication because then they can better gauge whether a "reasonable reader would have believed that the challenged statements were conveying facts about the plaintiff." *Davis*, 998 N.Y.S.2d at 137; *Brian*, 637 N.Y.S.2d at 351.

II. Defenses for DOI and DOI Employees in Defamation Actions

There are a couple of different defenses that DOI and DOI employees can use in defamation lawsuits. For example, public policy ensures that certain types of communications, while defamatory, cannot be the basis for a defamation action. *Rosenberg v. Metlife, Inc.*, 834 N.Y.S.2d 494, 497 (N.Y. 2007); *Toker v. Pollak*, 405 N.Y.S.2d 1, 4 (N.Y. 1978). Depending on the gravity of the public policy

concern, certain speakers' statements are afforded absolute privilege while those concerning lesser public interest are given qualified privilege. *Rosenberg*, 834 N.Y.S.2d at 497; *Liberman v. Gelstein*, 590 N.Y.S.2d 857, 862 (N.Y. 1992). Absolute privilege bars a communication from liability in a defamation suit. It is usually "reserved for communications made by individuals participating in a public function, such as executive, legislative, judicial or quasi-judicial proceedings." *Rosenberg*, 834 N.Y.S.2d at 497. The absolute privilege protection is to ensure that public officials do not alter their work and functions due to fear of civil action. *Rosenberg*, 834 N.Y.S.2d at 497-498; *see Park Knoll Associates v. Schmidt*, 464 N.Y.S.2d 424, 426 (N.Y. 1983). Qualified privilege on the other hand is a communication that is "fairly made by a person in the discharge of some public or private duty, legal or moral, or in the conduct of his own affairs, in a matter where his interest is concerned." *Toker*, 405 N.Y.S.2d at 5. Given this abstract definition, in order to further explain qualified privilege, courts have added, "[q]ualified privilege attaches, 'when a person makes a good-faith, bona fide communication upon a subject in which he or she has an interest, or a legal, moral or societal interest to speak, and the communication is made to a person with a corresponding interest.'" *Partridge v. State of New York*, 100 N.Y.S.3d 730, 738 (N.Y. App. Div. 3d Dep't 2019); *quoting Mughetti v. Makowski*, 79 N.Y.S.3d 749, 751 (N.Y. App. Div. 3d Dep't 2018). Qualified privilege statements are usually protected unless the plaintiff can show that the declarant made the claim with malice. Malice, for qualified privilege, has been "interpreted to mean spite or a knowing or reckless disregard of a statement's falsity." *Rosenberg*, 834 N.Y.S.2d at 497. The plaintiff then has the burden of proving the malice.

There are multiple cases that illustrate how DOI and DOI employees can be protected through absolute and qualified privilege. For example, in *Murphy v. City of New York*, which was later affirmed by New York's 1st Department of the Appellate Division, it was held that the DOI and DOI employees were not liable for defamation when multiple allegations and findings of fact from DOI reports were reported in the media. *Murphy v. City of New York*, 2008 N.Y. Misc. Lexis 10017. The plaintiff was the executive director of the New York City Employee Retirement System (NYCERS) and it was unearthed, through an anonymous letter, that he was involved in a romantic relationship with a subordinate and that

NYC DOI - OFFICE MEMORANDUM

he gave her as well as her friend promotions. The anonymous letter and the subsequent investigation were forwarded to NYC DOI and they then filed a report. Some of the allegations from the report were included in newspaper articles and on the television channel New York 1. *Murphy v. City of New York*, 2008 N.Y. Misc. Lexis 10017 at 9.

The case's main issue was if the defendants, including the DOI and DOI employees, defamed the plaintiff with the public dissemination of a DOI report which supposedly contained false statements. *Murphy v. City of New York*, 2008 N.Y. Misc. Lexis 10017 at 10. The Court found that the reports issued by DOI were protected by absolute immunity. This reasoning was based partially on the idea that, "[t]he privilege of absolute immunity is bestowed upon an official who is 'a principal executive of State or local government or is entrusted by law with administrative or executive policy-making responsibilities of considerable dimension."' *Murphy v. City of New York*, 2008 N.Y. Misc. Lexis 10017 at 11; *quoting Stukuls v. State of New York*, 297 N.Y.S.2d 740, 744 (N.Y. 1977). The Court went onto to say that "this privilege 'extends to those of subordinate rank who exercise delegated powers.'" *Murphy v. City of New York*, 2008 N.Y. Misc. Lexis 10017 at 11; *quoting Ward Telecom. & Computer Services v. State of New York*, 397 N.Y.S.2d 751, 753 (N.Y. 1977). The plaintiff, in this case, tried to equate DOI investigations to police investigations because police investigations have typically not been given absolute immunity. *Mahoney v. Temporary Comm. Of Investigation of the State of New York*, 565 N.Y.S.2d 870, 873 (N.Y. App. Div. 3d Dep't 1991). However, the Court explains that the DOI and its Commissioner are given investigative duty by either their own initiative, the mayor, or the city council. NYC Charter § 803[a]. Moreover, the specific investigations DOI executes are exclusive to them and may not be given to another branch without DOI's approval. Additionally, DOI is tasked with working with agency heads to establish standards and making an efficiency conduct and disciplinary system. Executive Order No. 78 [1986]. As the Court notes, "[t]his power goes far beyond merely investigatory functions consistent with that afforded to a police force, and evidences the intent of the mayor to delegate 'administrative or executive policy-making duties."' *Murphy v. City of New York*, 2008 N.Y. Misc. Lexis 10017 at 14-15; *Stukuls* 397 N.Y.S.2d at 744. Clearly the court saw DOI as more than an investigatory agency, but instead as an

administrative agency protected by absolute immunity. Lastly, in supporting that DOI and its employees were protected by absolute immunity when their report became public, the Court cited the *Aquilone* case in which it was determined that the *Deputy* Commissioner of Investigation's report was also protected by absolute privilege. (emphasis added). Thus, it is not just that the Commissioner of DOI's work product is protected by absolute privilege, but also those below him or her. This is due in part because the Deputy Commissioner is appointed by the Commissioner of the DOI and "derives his authority from the same delegated executive authority…" *Murphy v. City of New York*, 2008 N.Y. Misc. Lexis 10017 at 17.

There are many other examples when government agencies such as DOI were able to use absolute or qualified privilege in order to guard itself against a defamation suit. For example, in *Kuczinski v. City of New York* a judge in the Southern District of New York ruled that a report that was sent to the Mayor's office by DOI was barred from defamation by either absolute or qualified privilege (the judge did not specify which one). *Kuczinski v. City of New York*, 352 F. Supp.3d 314, 326 (S.D.N.Y. 2019). Interestingly, in this case there was one report that was sent to the Mayor's office and allegedly a different version of the same report, which supposedly had more defamatory statements, that was then leaked to the press. The Court ruled, as it pertained to the Mayor's report, that similar agencies have been given absolute or qualified privilege when sending reports such as the one in the case. However, as it concerned the allegedly more defamatory report, the Court ruled that the plaintiff never stated a claim for which there could even be a defamation suit. *Kuczinski*, 352 F. Supp.3d at 326. It should be noted though, that while the Judge separated the analysis between the Mayor report and the press report, the analysis on the Mayor report cited cases in which reports similar to the one given to the Mayor were protected by absolute or qualified privilege even when they were leaked to the press. *Kuczinski*, 352 F. Supp.3d at 326; *see Murphy v. City of New York*, 874 N.Y.S.2d 407 (N.Y. App. Div. 1st Dep't 2009); *Firth v. State*, 785 N.Y.S.2d 755 (N.Y. App. Div. 3d Dep't 2004) ("author of a report was protected by absolute privilege even though the report was published on the internet."). One could potentially infer from the cases cited that had the mayoral report been leaked to the press, it too would have been protected by absolute privilege. Thus, this case is another example of DOI being cloaked with absolute or qualified privilege.

NYC DOI - OFFICE MEMORANDUM

In ***Firth v. State*** the 3rd Department Appellate Division ruled similarly to prior cases mentioned, holding that the New York Office of the State Inspector General (OSIG) was protected with absolute privilege when one of their reports was republished on the internet. In ***Firth,*** OSIG investigated and later published a report regarding potential criminal activity within the New York Department of Environmental Conservation Law Enforcement Division. Citing analogous reasoning to that in ***Murphy v. City of New York***, the court ruled that because the Governor would have absolute immunity, and OSIG is given power from the Governor, OSIG was "entitled to absolute immunity from defendants claims in fulfilling its duties to investigate and report instances of corruption, fraud, or mismanagement." ***Firth***, 785 N.Y.S.2d at 756-757. The Court at bar though went a step further, stating that even if OSIG was not given powers from the Governor its report would still be shielded with absolute privilege because OSIG's functions surpass the mere investigatory powers that the police have. Rather, OSIG has policy-making responsibilities that are typically associated with absolute privilege. OSIG, like DOI, reviews agencies' policies and procedures, makes recommendations involving fraud, corruption and other criminal activity, on top of having the power to subpoena witnesses and demand production of documents. ***Firth,*** 785 N.Y.S.2d at 757. Thus, much of the same reasoning used to show that reports by OSIG are covered in absolute immunity or qualified immunity are also used for DOI. Moreover, because DOI and OSIG have relatively similar functions and acquire powers from corresponding sources, they can utilize these factors to differentiate themselves from police departments, which per ***Mahoney,*** do not get absolute immunity.

As it pertains to press releases, New York courts tend to look at how reckless the language or imagery is. For example, in ***Partridge v. State of New York*** the plaintiff won a defamation action when his photo was part of a poster board that included 60 other individuals who were arrested by state police for online exploitation of children, when the plaintiff was arrested for drug possession. Additionally, this poster board was displayed during a press conference on sexual exploitation of minors that also included a press release and a media advisory. ***Partridge***, 100 N.Y.S.3d at 733-734. The court noted that typically when communication is posted that is within the public concern, a private individual cannot sue unless the message was publicized '"in a grossly irresponsible manner without due consideration for the standards of

information gathering and dissemination ordinarily followed by responsible parties."' *Partridge*, 100 N.Y.S.3d at 738; *Chapadeau v. Utica Observer-Dispatch, Inc.*, 379 N.Y.S.2d 61, 64 (N.Y. 1975). Even with all this said, the court found that given the press conference was touted as a protection of children from sexual exploitation it was egregiously irresponsible for the plaintiff's photo to be included. Though the court found that the communication was subject to qualified privilege, nonetheless they found that plaintiff adequately showed that the defendant acted with malice, a requirement for a plaintiff to win against qualified privilege. The court wrote that the defendants, who were in charge of press dissemination, had knowledge that the plaintiff was not charged with a sexual offense, yet they still went through with the press conference with the photo on a "wall of shame." *Partridge*, 100 N.Y.S.3d at 739. The court found the actions of the plaintiffs to be reckless enough to constitute malice.

However, in *Tattoos by Design v. Kowalski*, the court found that statements made by the New York Department of Health (DOH), in a press release, regarding a particular tattoo company were protected by qualified privilege. In this case DOH had been investigating a tattoo artist who had allegedly caused skin infections. This tattoo artist had supposedly worked with the plaintiff as well. The Court first stated that the statements, even if defamatory, were protected by qualified privilege because the defendants were public health officials who had a duty to alert the public about potential hazards to their well-being. *Tattoos by Design, Inc. v. Kowalski*, 24 N.Y.S.3d 840, 842 (N.Y. App. Div. 4th Dep't 2016). As noted previously, in order to defeat a qualified privilege defense, the plaintiff must show that the defendants acted with malice. In this case, there was no evidence to show that the defendants did that. *Id.* Thus, in regard to press releases, courts focus on the messaging, how it is displayed, and the negligence or lack thereof on the part of the party releasing them.

III. Best Practices for NYC DOI to Avoid Defamation Suits

NYC DOI - OFFICE MEMORANDUM

NYC DOI can protect itself from defamation suits by following many of the guidelines implicitly and explicitly set by the above caselaw. First, it appears that DOI reports or those similar tend to be given qualified immunity at the very least, if not absolute immunity. Multiple cases showed that the courts view DOI, not as an investigatory police force, which is not subject to absolute immunity, but rather as an administrative, advisory, ***and*** investigatory office, which subjects it to more privileges. As the cases above showed, so long as DOI is acting within its capacity and NYC Charter, its reports tend to be cloaked with absolute immunity.

However, there is still a lingering question if DOI reports are confidential and should remain private. The ***Murphy v. City of New York*** case also took on this issue of if it was a violation of the NYC Charter §803 or §805 if DOI reports become available. The court first noted that nothing on the face of §803 or §805 stated that DOI had to guarantee that its final reports would remain confidential. ***Murphy v. City of New York***, 2008 N.Y. Misc. Lexis 10017 at 26-27. The plaintiff, in ***Murphy***, argued that there was caselaw that showed that DOI had to keep its reports internal, but the court aptly countered that most of the cases cited by the plaintiff were before the enactment of New York's modern Freedom of Information Law (FOIL). ***Murphy v. City of New York***, 2008 N.Y. Misc. Lexis 10017 at 28-29. FOIL's passage changed New York's document production requirement, making it more of a priority for their records and reports to be available to the public. As such, the court found that the plaintiff in this case was not only wrong that DOI had to keep its reports confidential, but in fact they were obligated to make it available unless it was under a certain FOIL exemption. ***Murphy v. City of New York***, 2008 N.Y. Misc. Lexis 10017 at 28.

For press releases, courts in New York have appeared to use three different factors; (1) the actual messaging used, (2) how the press release is delivered, and (3) the attention or lack thereof in executing the press release based on the information available to the agency. As noted in the cases above, many of the press releases were given at least qualified immunity. Thus, in order to proceed with a defamation case, the plaintiff had to show that the defendant acted with malice. "Malice includes spite, ill will, knowledge that the statements are false or reckless disregard as to whether they are false. Spite and ill will

refer to the speaker's motivation for making the allegedly defamatory comments, not to the defendant's general feelings about the plaintiff." *Curren v. Carbonic Sys., Inc.*, 872 N.Y.S.2d 240, 242 (N.Y. App. Div. 3d Dep't 2009). Thus, given the DOI press office may issue press releases containing defamatory statements, it is important that there is proper communication between the investigators and the press office in order to avoid possible negligent or reckless posts. In order to avoid situations similar to *Partridge*, it would be helpful for investigators to have a role in crafting the press release, given they know their investigations best. Still, qualified privilege affords government agencies, such as DOI, with much leeway in press releases. Moreover, it may be obvious, but there should clearly be no intention to embarrass, humiliate or unnecessarily smear the reputation of one who is a subject of a press release. These suggestions, coupled with the caselaw above, should give NYC DOI a thorough plan for avoiding defamation suits or defending themselves in a potential defamation case.

Applicant Details

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Date of JD/LLB	**April 29, 2021**
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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June 12, 2023

The Hon. Kiyo Matsumoto
United States District Court, Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Dear Judge Matsumoto:

I am an alumna of Columbia Law School ('21) and a second-year associate at Gibson, Dunn & Crutcher in Washington, D.C. I write to apply for a clerkship in your chambers beginning in 2025. I became interested in clerking during my second year at Columbia, when I externed for the Hon. Raymond Lohier of the U.S. Court of Appeals for the Second Circuit and worked closely with his clerks. As part of my responsibilities, I researched and wrote bench memoranda, drafted judicial orders, and observed oral arguments. My externship was valuable, and I hope to gain more practice experience through a term clerkship.

At Columbia, I served as a Note Editor on the *Columbia Human Rights Law Review* and placed as a Semifinalist in the Harlan Fiske Stone Moot Court competition. In my time at Gibson Dunn, I have pushed myself to gain as much experience as I can. For a *pro bono* matter, I successfully researched, briefed, and argued an asylum case in immigration court on behalf of a young man from El Salvador. In a complex commercial case involving antitrust and trade secrets issues, I prepared witnesses for trial and took the lead on drafting the post-trial conclusions of law. I have researched and written briefs, legal memoranda, discovery motions, and government filings for matters across industries and practice areas, including in antitrust, white collar, securities, international trade, and complex commercial litigation.

I would be especially eager to clerk in the Eastern District of New York, as I lived in New York for three years during law school and still visit frequently.

Please find my resume, transcript, and writing sample included in this application, along with letters of recommendation from Professors Kristen Underhill (kunderhill@cornell.edu), Emily Benfer (emily.benfer@law.gwu.edu), and (retired) Carl Kaplan (cskaplan@aol.com). As additional references, you may reach out to Professor Eric Talley (etalley@law.columbia.edu), Kristen Limarzi (klimarzi@gibsondunn.com), and Joseph West (jwest@gibsondunn.com).

Thank you for your consideration. Please let me know should you need additional information.

Best,
Connie Lee

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Taiwanese Law and Culture Club, President

DARTMOUTH COLLEGE, Hanover, NH
B.A., *cum laude,* received June 2018
Major: Government, Philosophy
Activities: Dartmouth Parliamentary Debate, President
Department of Government, Research Assistant to Sonu Bedi (Spring 2018)
Study Abroad: Keble College, Oxford (Spring 2017) and LSE (Fall 2016)

EXPERIENCE

GIBSON, DUNN & CRUTCHER, LLP, Washington, D.C.
Associate Attorney Oct 2021 – present
Summer Associate Jun 2020 – July 2020
Practicing in the Litigation group across antitrust, white collar, securities, and commercial litigation matters. Researching and writing memos, trial and appellate briefs, discovery motions, government presentations and filings, direct and cross examination outlines, and conclusions of law in a variety of matters. Successfully briefed and argued an immigration case to win asylum for a pro bono client in November 2022. Currently part of a trial team for an ongoing antitrust litigation.

U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT, New York, NY
Extern for the Hon. Raymond J. Lohier Jan 2020 – May 2020
Researched and wrote bench memos. Drafted summary orders for civil and criminal cases.

HAYNES AND BOONE, LLP, Houston, TX
Summer Associate May 2019 – July 2019
Drafted sections of appellate briefs, responses to interrogatories and requests for production, and answers to potential questions for Fifth Circuit oral arguments. Researched and wrote memos for appellate, employment, environmental, and commercial litigation cases.

U.S. DEPARTMENT OF JUSTICE, Washington, D.C.
Intern in the Civil Rights Division Jan 2017 – April 2017
Researched and wrote memos advising attorneys on Title VI cases. Drafted MOAs, MOUs, and settlements between DOJ and agencies under investigation. Created and presented a workshop for attorneys on interpreting statistical analysis in civil rights investigations.

LANGUAGE SKILLS: Mandarin Chinese (proficient; speaking)
INTERESTS: cooking; classical music and opera singing; travel photography

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DATE AWARDED: May 19, 2021
PROGRAM: LAW

PROGRAM TITLE: LAW

HARLAN FISKE STONE SCHOLAR-FIRST YEAR ENDING MAY 19
HARLAN FISKE STONE SCHOLAR-SECOND YEAR ENDING MAY 20
HARLAN FISKE STONE SCHOLAR-THIRD YEAR ENDING MAY 21
Mandatory Pro Bono, 40 Hours

SUBJECT	COURSE NUMBER	TITLE	POINTS	GRADE
Fall 2018				
LAW	L 6101	CIVIL PROCEDURE	4.00	A-
LAW	L 6105	CONTRACTS	4.00	B+
LAW	L 6113	LEGAL METHODS	1.00	CR
LAW	L 6115	LEGAL PRACTICE WORKSHOP I	2.00	P
LAW	L 6118	TORTS	4.00	A
Spring 2019				
LAW	L 6108	CRIMINAL LAW	3.00	B+
LAW	L 6116	PROPERTY (FOUNDATION)	4.00	A-
LAW	L 6121	LEGAL PRACTICE WSHOP II	1.00	P
LAW	L 6130	LEGAL METHODS II	1.00	CR
LAW	L 6133	CONSTITUTIONAL LAW	4.00	A-
LAW	L 6256	FEDERAL INCOME TAXATION	4.00	B
LAW	L 6679	FOUNDATION YEAR MOOT COUR	0.00	CR
Fall 2019				
LAW	L 6358	HEALTH JUSTICE ADVOCACY C	7.00	A-
LAW	L 6425	FEDERAL COURTS	4.00	A-
LAW	L 6655	HUMAN RIGHTS LAW REVIEW	0.00	CR
LAW	L 6675	MAJOR WRITING CREDIT	0.00	CR
LAW	L 6683	SUPERVISED RESEARCH PAPER	1.00	CR
LAW	L 8452	ENERGY REGULATION	2.00	A-

L6683 WITH FAGAN, JEFFREY

SUBJECT	COURSE NUMBER	TITLE	POINTS	GRADE
Spring 2020				
Due to the COVID-19 pandemic, Mandatory Pass/Fail grading was in effect for all regular, full-term courses for the spring 2020 semester.				
LAW	L 6169	LEGISLATION AND REGULATIO	4.00	CR
LAW	L 6293	ANTITRUST AND TRADE REGUL	3.00	CR
LAW	L 6655	HUMAN RIGHTS LAW REVIEW	0.00	CR
LAW	L 6664	EXTERNSHIP:FED APPELLATE	1.00	CR
LAW	L 6664	EXT:FED APPELLATE CRT-FLDWRK	3.00	CR
LAW	L 6683	SUPERVISED RESEARCH PAPER	2.00	CR
L6683 WITH FAGAN, JEFFREY				
Fall 2020				
LAW	L 6231	CORPORATIONS	4.00	A-
LAW	L 6238	CRIMINAL ADJUDICATION	3.00	A-
LAW	L 6274	PROFESSIONAL RESPONSIBILI	3.00	A-
LAW	L 6655	HUMAN RIGHTS LAW REVIEW	1.00	CR
LAW	L 6663	EXTERNSHIP: CRIMINAL APPE	2.00	A
LAW	L 6663	EXTERNSHIP: CRIMINAL APPE	2.00	CR
LAW	L 6680	HARLAN F. STONE HON COMPE	0.00	CR
Spring 2021				
LAW	L 6241	EVIDENCE	4.00	A-
LAW	L 6276	HUMAN RIGHTS	3.00	A-
LAW	L 6355	HEALTH LAW	4.00	A
LAW	L 6655	HUMAN RIGHTS LAW REVIEW	1.00	CR

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IN THE CITY OF NEW YORK

Columbia College, Engineering and Applied Science, General Studies, Graduate School of Arts and Sciences, International and Public Affairs, Library Service, Human Nutrition, Nursing, Occupational Therapy, Physical Therapy, Professional Studies, Special Studies Program, Summer Session
A, **B**, **C**, **D**, **F** (excellent, good, fair, poor, failing). NOTE: Plus and minus signs and the grades of **P** (pass) and **HP** (high pass) are used in some schools. The grade of **D** is not used in Graduate Nursing, Occupational Therapy, and Physical Therapy.

American Language Program, Center for Psychoanalytic Training and Research, Journalism
P (pass), **F** (failing). Grades of **A**, **B**, **C**, **D**, **P** (pass), **F** (failing) — used for some offerings from the American Language Program Spring 2009 and thereafter.

Architecture
HP (high pass), **P** (pass), **LP** (low pass), **F** (failing), and **A**, **B**, **C**, **D**, **F** — used June 1991 and thereafter **P** (pass), **F** (failing) — used prior to June 1991.

Arts
P (pass), **LP** (low pass), **F** (fail). **H** (honors) used prior to June 2015.

Business
H (honors), **HP** (high pass), **P1** (pass), **LP** (low pass), **P** (unweighted pass), **F** (failing); plus (+) and minus (-) used for H, HP and P1 grades Summer 2010 and thereafter.

College of Physicians and Surgeons
H (honors), **HP** (high pass), **P** (pass), **F** (failing).

College of Dental Medicine
H (honors), **P** (pass), **F** (failing).

Law
A through **C** [plus (+) and minus (-) with **A** and **B** only], **CR** (credit - equivalent to passing). **F** (failing) is used beginning with the class which entered Fall 1994. Some offerings are graded by **HP** (high pass), **P** (pass), **LP** (low pass), **F** (failing). **W** (withdrawn) signifies that the student was permitted to drop a course, for which he or she had been officially registered, after the close of the Law School's official Change of Program (add/drop) period. It carries no connotation of quality of student performance, nor is it considered in the calculation of academic honors.
E (excellent), **VG** (very good), **G** (good), **P** (pass), **U** (unsatisfactory), **CR** (credit) used from 1970 through the class which entered in Fall 1993.

Any student in the Law School's Juris Doctor program may, at any time, request that he or she be graded on the basis of Credit-Fail. In such event, the student's performance in every offering is graded in accordance with the standards outlined in the school's bulletin, but recorded on the transcript as Credit-Fail. A student electing the Credit-Fail option may revoke it at any time prior to graduation and receive or request a copy of his or her transcript with grades recorded in accordance with the policy outlined in the school bulletin. In all cases, the transcript received or requested by the student shall show, on a cumulative basis, all of the grades of the student presented in single format – i.e., all grades shall be in accordance with those set forth in the school bulletin, or all grades shall be stated as Credit or Fail.

Public Health
A, **B**, **C**, **D**, **F** - used Summer 1985 and thereafter. **H** (honors), **P** (pass), **F** (failing) — used prior to Summer 1985.

Social Work
E (excellent), **VG** (very good), **G** (good), **MP** (minimum pass), **F** (failing).
A though **C** is used beginning with the class which entered Fall 1997. Plus signs used with **B** and **C** only, while minus signs are used with all letter grades. The grade of **P** (pass) is given only for select classes.

OTHER GRADES USED IN THE UNIVERSITY

AB = Excused absence from final examination.

AR = Administrative Referral awarded temporarily if a final grade cannot be determined without additional information.

AU = Audit (auditing division only).

CP = Credit Pending. Assigned in graduate courses which regularly involve research projects extending beyond the end of the term. Until such time as a passing or failing grade is assigned, satisfactory progress is implied.

F* = Course dropped unofficially.

IN = Work Incomplete.

MU = Make-Up. Student has the privilege of taking a second final examination.

R = For the Business School: Indicates satisfactory completion of courses taken as part of an exchange program and earns academic credit.

R = For Columbia College: The grade given for course taken for no academic credit, or notation given for internship.

R = For the Graduate School of Arts and Sciences: By prior agreement, only a portion of total course work completed. Program determines academic credit.

R = For the School of International and Public Affairs: The grade given for a course taken for no academic credit.

UW = Unofficial Withdrawal.

UW = For the College of Physicians and Surgeons: Indicates significant attempted coursework which the student does not have the opportunity to complete as listed due to required repetition or withdrawal.

W = Withdrew from course.

YC = Year Course. Assigned at the end of the first term of a year course. A single grade for the entire course is given upon completion of the second term. Until such time as a passing or failing grade is assigned, satisfactory progress is implied.

OTHER INFORMATION

NOTE: All students who cross-register into other schools of the University are graded in the **A, B, C, D, F** grading system regardless of the grading system of their own school, except in the schools of Arts (prior to Spring 1993) and in Journalism (prior to Autumn 1992), in which the grades of P (pass) and **F** (failing) were assigned. Notations at the end of a term provide documentation of the type of separation from the University.

% of **A** Effective fall 1996: Transcripts of Columbia College students show the percentage of grades in the **A** (**A+**, **A**, **A-**) range in all classes with at least 12 grades, the mark of **R** excluded. Calculations are taken at two points in time, three weeks after the last final examination of the term and three weeks after the last final of the next term. Once taken, the percentage is final even if grades change or if grades are submitted after the calculation. For additional information about the grading policy of the Faculty of Columbia College, consult the College Bulletin.

KEY TO COURSE LISTINGS

A course listing consists of an area, a capital letter(s) (denotes school bulletin) and the four digit course number (see below).

*The **capital letter** indicates the University school, division, or affiliate offering the course:*

A	Graduate School of Architecture, Planning, and Preservation
B	School of Business
BC	Barnard College
C	Columbia College
D	College of Dental Medicine
E	School of Engineering and Applied Science
F	School of General Studies
G	Graduate School of Arts and Sciences
H	Reid Hall (Paris)
J	Graduate School of Journalism
K	School of Library Services/Continuing Education (effective Fall 2002)
L	School of Law
M	College of Physicians and Surgeons, Institute of Human Nutrition, Program in Occupational Therapy, Program in Physical Therapy, Psychoanalytical Training and Research
N	School of Nursing
O	Other Universities or Affiliates/Auditing
P	School of Public Health
Q	Computer Technology/Applications
R	School of the Arts
S	Summer Session
T	School of Social Work
TA-TZ	Teachers College
U	School of International and Public Affairs
V	Interschool Course
W	Interfaculty Course
Y	Teachers College
Z	American Language Program

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*The **first digit** of the course number indicates the level of the course, as follows:*

0	Course that cannot be credited toward any degree
1	Undergraduate course
3	Undergraduate course, advanced
4	Graduate course open to qualified undergraduates
5	Graduate course open to qualified undergraduates
6	Graduate course
7	Graduate course
8	Graduate course, advanced
9	Graduate research course or seminar

Note: Level Designations Prior to 1961:
1-99 Undergraduate courses
100-299 Lower division graduate courses
300-999 Upper division graduate courses

The term designations are as follows:
X=Autumn Term, Y=Spring Term, S=Summer Term
Notations at the end of a term provide documentation of the type of separation from the University.

THE ABOVE INFORMATION REFLECTS GRADING SYSTEMS IN USE SINCE SPRING 1982. THE CUMULATIVE INDEX, IF SHOWN, DOES NOT REFLECT COURSES TAKEN BEFORE SPRING OF 1982. ALL TRANSCRIPTS ISSUED FROM THIS OFFICE ARE OFFICIAL DOCUMENTS. TRANSCRIPTS ARE PRINTED ON TAMPER-PROOF PAPER, ELIMINATING THE NEED FOR SIGNATURES AND STAMPS ON THE BACK OF ENVELOPES. FOR CERTIFICATION PURPOSES, A REPRODUCED COPY OF THIS RECORD SHALL NOT BE VALID. THE HEAT-SENSITIVE STRIP, LOCATED ON THE BOTTOM EDGE OF THE FACE OF THE TRANSCRIPT, WILL CHANGE FROM BLUE TO CLEAR WHEN HEAT OR PRESSURE IS APPLIED. A BLUE SIGNATURE ALSO ACCOMPANIES THE UNIVERSITY SEAL ON THE FACE OF THE TRANSCRIPT.

June 11, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I'm delighted to write in support of a clerkship for Connie J. Lee, a former student of mine at Columbia Law School. She would be an outstanding clerk and I recommend her enthusiastically and without reservation.

I recently retired – after a 23-years stint (!) – as a senior appellate counsel at the Center for Appellate Litigation. CAL is a Manhattan-based public appellate defender organization that represents poor people from the Bronx and Manhattan on criminal appeals before New York State courts, in particular the Appellate Division, First Department, and the Court of Appeals. I continue to work on cases for CAL on a volunteer basis. I also recently retired as a lecturer-in-law at Columbia Law School – after more than a dozen years. I founded, designed, and up to January 2021 co-taught an externship program there in criminal appeals. I received a JD from Columbia (Stone Scholar) in 1994 and a B.A., magna cum laude, from Amherst in 1976.

Connie was one of six students in our externship in the fall of '20. I got to know her quite well. As part of the externship, she actively participated in a weekly two-hour academic seminar. In addition, outside the classroom I directly supervised her on nearly a biweekly basis from September '20 until the end of December '20 as she, along with a student partner, took on an actual criminal appeal for a client who had been convicted of attempted first-degree murder and sentenced to 15 to life.

Connie's appeal would have been challenging for any experienced lawyer. Our client, Mr. Washington, was essentially accused of falsely calling in a Chinese food delivery order, waiting in an apartment stairwell for the delivery man, Mr. Zhu Xing, to arrive, and then springing upon Mr. Zhu with a knife – chasing and swinging the knife at him and poking and cutting him until he dropped the take-out bag of food. After that, Mr. Washington scooped up the dropped food and exited. Happily, the victim's wounds were all superficial and he was released from hospital after a few hours.

The People's theory, which prevailed at trial, was that in the course of a robbery Mr. Washington had the separate intent to kill the food delivery man and almost accomplished that task. In her work on the brief, Connie and her partner had to distill a compelling and accurate Statement of Facts narrative from the facts and exhibits elicited at trial. Connie drafted and polished Point I of the brief, which argued that the verdict was against the weight of the evidence, i.e., that based on all the circumstances, the evidence did not support the conclusion that Mr. Washington had an intent to kill when he superficially cut the food deliveryman to get him to drop the food.

In the course of her work on the appeal, Connie successfully performed many difficult tasks that were perhaps new to her. For example, she digested the appellate record; spotted fruitful legal issues and rejected marginal ones; corresponded with our client; researched the law; drafted a legal issue memo; outlined and drafted sections of the appellate brief, and then re-drafted them in light of our discussions and my written comments. She also engaged in mock appellate arguments in class.

It was a delight to work with Connie! I found her to be mentally sharp, energetic, enterprising, well-organized, and responsible. She made every deadline and at every turn was eager to do more than I had asked of her.

One other thing I'd like to mention: She told me that when she first read the facts of our case, she had some difficulty with the nature of the crime – at a time when crimes against Asian-Americans in New York City were disproportionally high, the unprovoked assault against a Chinese delivery driver "felt close to home," she said. But she also told me that she deeply believes every person has the right to zealous legal representation. I watched with pride as she grew into her role as a strong advocate for our client within the law.

I think I am in an excellent position to comment, as well, on the quality of Connie's writing and legal research, for she made many efforts in that area under my criticisms. In short, Connie's legal writing is outstanding. I say that not just as an experienced appellate counsel but also as a former newspaper reporter, editor, and columnist. She is capable of writing a simple declarative sentence – no small thing. In our class and in our editorial sessions I emphasized that good legal writers write simply and concisely, emphasize nouns and verbs, and strive to be clear. Connie's appeals brief drafts were excellent in their clarity and force. Her research and legal reasoning skills are excellent, too. I rate her as an outstanding young lawyer, and I graded her accordingly. In fact, here's my nutshell "final performance evaluation" of her for Columbia, which I penned in December 2020: "This is an exceptionally strong student. Outstanding legal research/analysis; outstanding writer and advocate; outstanding++ oral advocacy. I rely on her to do heavy lifting. Shows initiative. She is amazing!"

I am quite confident she would do very, very well in a judicial clerkship.

Sincerely,

Carl S. Kaplan

Senior Appellate Counsel, Center for Appellate Litigation (Ret.)

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June 19, 2023

Re: Connie Lee, Application for Clerkship

Dear Judge:

I am very pleased to recommend Connie Lee for a clerkship in your chambers. I met Connie in the fall of 2018, when she enrolled as a 1L student in my Torts class at Columbia Law School. I subsequently worked with Connie as a 3L student in my Health Law course in 2021, and we had an opportunity to work as coauthors on a paper with some professors we know in common at Brown University. Connie is tremendously bright, meticulous, thoughtful, and talented, and she will be a standout addition to any group of clerks.

Connie's classroom and exam performance in both Torts and Health Law was exemplary. She was unfailingly prepared for cold calls and a reliable source of astute questions and comments in open classroom discussions on tort and health policy. From the start in Torts, she showed a strong interest in the social implications of legal rules, and her office hour questions in were relevant and showed genuine engagement and curiosity in this area of the law. I learned early in Connie's law school career that she had an interest in Health Law, and we connected over the next few years on the topic as she forwarded me news articles of interest. When Connie signed up for Health Law in the spring of 2021, the world had changed. We were on Zoom, rather than in person, and we had many fewer opportunities to interact; Connie, however, was as engaged and lively on Zoom as she was in person, and she showed the same productive interest in exploring and mastering our course material.

Connie's marks easily reflected her in-class performance, and she achieved two A marks despite a very strict curve in both classes. In my course of 106 Torts students that year, both of Connie's policy essays received best-in-class marks for the exam. I still use one of Connie's policy essays as a model for my current 1Ls to teach in-depth policy critique and prepare them for exams. Connie's two exam essays focused on public nuisance doctrine and adjustments to the reasonable person standard, and both showed a great capacity to draw connections across different course materials, cases, and tort doctrines to build a persuasive argument. Her Health Law essays concerned maternal mortality and religious exemptions to health care nondiscrimination laws, and both were similarly among the highest marks in the class of 51 students. Connie's analytic and written communication skills are superb, and they will serve her (and her judge) well in a clerkship.

Notably, Connie's issue spotter work in both exams also showed the highest caliber accuracy, organization, and performance under pressure. Both of my exams required two-hour issue spotters with a barrage of issues, each eligible for 3-4 points for accurate identification, analysis, and inclusion of a supportive case citation. Connie had the fifth-highest performance on the issue spotter portion of the exam, with 475 total points, reflecting her analysis of 148 separate issues in the allotted time. Connie's skills particularly stood out in tricky issues on municipal liability, proximate causation, wrongful death, and thoughtful uses of tort defenses. In Health Law, Connie was the very top performer in the issue spotter portion of the exam, resolving 132 issues and outperforming the next students by a margin of more than 20 points. As in Torts, Connie's issue spotter work in the Health Law exam showed an excellent grasp of the most difficult issues, including ERISA claims preemption, federal fraud and abuse statutes,

and allocating liability across different persons and corporate actors in health care institutions. To achieve these marks, Connie needed complete mastery of the doctrines in both courses, keen attention to situational facts, and easy access (by memory or by good organization) to appropriate case law support drawn from course materials. Her skills are impeccable, and again will serve her well as a clerk.

Finally, I have found Connie to be collegial, a well-respected and well-liked presence among her peers, professional and deferential in our interactions, and extremely hardworking. I was delighted to have a chance to work with her on a coauthored piece published in Critical Public Health, a peer-reviewed public health journal, and she was a professional and diligent collaborator in that work. I think Connie will be a memorably outstanding and helpful clerk, and I am delighted to support her candidacy.

Thank you for considering Connie's application, and I would be pleased to speak about her more by phone if it would be helpful.

Sincerely,

Kristen Underhill, DPhil, JD

The following writing sample is a section of a brief that I wrote for the Harlan Fiske Stone Moot Court competition at Columbia Law School in 2020-21. The competition provided a fictitious record in which the Appellant, known as "Relator" in the brief, brought a *qui tam* action against the Appellee, a company called Confluence. The lawsuit alleged that Confluence had submitted fraudulent claims under the Paycheck Protection Program ("PPP") loan program during the COVID-19 pandemic in violation of the False Claims Act. The fictitious case was an appeal to the Fifth Circuit. I represented Confluence, the Appellee, in the competition and in the brief below.

The sample that follows is a section of the legal argument, which argues that the Appellee lacked the requisite scienter to commit fraud, and furthermore, the alleged fraud was immaterial. This sample has <u>not</u> been edited by others.

ARGUMENT

A claim under the False Claims Act (FCA) must plead four elements to survive a motion to dismiss: "(1) false statement or fraudulent course of conduct; (2) made or carried out with the requisite scienter; (3) that was material; (4) that caused the government to pay out money or to forfeit moneys due (i.e., that involved a claim)." *United States ex rel. Longhi v. United States*, 575 F.3d 458, 467 (5th Cir. 2009) (internal citation removed). Relator's pleading fails to satisfy either scienter or materiality. First, there is no evidence in the record that Confluence made false claims with knowledge, deliberate ignorance, or reckless disregard for the truth or falsity of the claims. Relator's allegations are based on a pattern of circumstantial evidence that shows negligence at most, which triggers no FCA liability. *See Longhi*, 575 F.3d at 480, *U.S. ex rel. Taylor-Vick v. Smith*, 513 F.3d 228, 231 (5th Cir. 2008). Second, Relator fails to plead that any defects in the loan applications would have materially impacted the government's payment scheme. *See Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 2003–04, 195 L. Ed. 2d 348 (2016). The issues with the applications were either minor formalities or were outside the scope of the express conditions of the Paycheck Protection Program (PPP) loans, thus falling closer to "garden-variety" regulatory infractions that the FCA does not aim to punish. *See id.* Because there is no genuine issue of material fact on either the standard of review or the merits, this Court should affirm the district court's dismissal of the case.

I. THE DISTRICT COURT CORRECTLY FOUND NO EVIDENCE THAT DEFENDANTS ACTED WITH THE REQUISITE SCIENTER.

Under the False Claims Act, "liability does not attach unless the defendant knowingly asks the Government to pay amounts it does not owe." *U.S., ex rel. Johnson v. Kaner Med. Grp.,*

P.A., 641 F. App'x 391, 394 (5th Cir. 2016) (internal citation removed). § 3729(b) of the FCA defines "knowing" and "knowingly" as meaning that the individual: (1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of that information; or (3) acts in reckless disregard of the truth or falsity of the information. 31 U.S.C.A. § 3729(b) (West). To the extent that Confluence made any false claims for PPP loans, there is no indication in the record that this was done with the requisite scienter. Without this, summary judgment is appropriate. *See U.S. ex rel. Taylor-Vick v. Smith*, 513 F.3d 228, 232 (5th Cir. 2008).

Relator points to no direct evidence to show that Confluence knowingly made false claims through a scheme to defraud the SBA. *See* Complaint, R. at 30–36. Instead, the Complaint describes alleged defects in the six disputed loan applications from Blecher's Board Games, Cedars Distillery, Mursea Hotel, Peak Cuts, Linda Beauty Bar, and Liberation Bookstore to suggest a pattern of poor loan writing and lack of quality control. *Id*. This is circumstantial evidence similar to the kind that this Court considered and found insufficient in *Taylor-Vick*, 513 F.3d at 232. In *Taylor-Vick*, the relator alleged a "pattern of erroneous billing" through examples of false claims. *Id*. This Court differentiated the case from ones in which an FCA violation was demonstrated through direct evidence of intent such as affidavits from employees stating that they made false claims in their tenure at the company. *Id*. (citing *United States v. Hangar One, Inc.*, 563 F.2d 1155, 1157 (5th Cir. 1977)). Here too, the circumstantial evidence that Relator raises is insufficient to show scienter.

A. The approved loans were reasonable interpretations of the PPP requirements.

Relator's Complaint falsely presumes that the six disputed loans that Confluence approved in 2019 were fraudulent. Complaint, R. at 32–36. However, the record lacks any

evidence that Confluence employees approved the loans while knowing that they did not meet PPP requirements, and the approvals fell squarely within a reasonable interpretation of the PPP. There is no evidence to support an inference that the approvals reflected "deliberate ignorance" or "reckless disregard" of the veracity of the information under 31 U.S.C.A. § 3729(b) (West).

First, the loan approval to Peak Cuts was a clearly correct application of law. The issue with the initial application was that the owner, Lange, left blank a question about prior felony convictions due to confusion about how to answer the question correctly. R. at 69. Lange's prior conviction fell well outside of the five-year range implicated by the application, and he would have been able to answer the question with "no" like other eligible applicants. R. at 81. Because Lange was in fact eligible for the loan, the application defect cannot be said to have "knowingly ask[ed] the Government to pay amounts it does not owe" in violation of the False Claims Act. *Johnson*, 641 F. App'x at 394. Furthermore, Presh took subsequent curative steps to void the first application, send a corrected version, and call SBA to confirm receipt and provide supporting documentation. R. at 81. Relator does not suggest that the final version of the application contained any error nor challenge the sufficiency of the curative measure. Complaint, R. at 35.

Second, the issues with Linda Beauty Bar and Liberation Bookstore were non-substantive oversights involving a missing signature page and a missing initial respectively. R. at 80. There is no suggestion that the businesses were in fact ineligible nor that the substantive claims on the application contained errors. *Id*. Thus, even if the approvals evince an oversight on Confluence's part, there is no allegation that the missing verifications were deliberately or recklessly misrepresentative. *Id*. Even in cases involving much more substantive verification defects, courts in this Circuit have not found FCA violations on that basis alone. For example, in

U.S. ex rel. Wall v. Vista Hospice Care, Inc., 778 F. Supp. 2d 709, 716 (N.D. Tex. 2011), the relator alleged that the defendants had forged physician signatures to improperly certify patients for hospital care. Even in *Wall*, the Court found that allegations of forged signatures without a more specific pleading of the participants' intent to commit fraud was insufficiently pled. *Id*. Here, the issue does not even involve a forged signature, which is suggestive of deception, but merely a missing one. R. at 80.

The final three loans were approved based on a reasonable understanding of the PPP loan requirements. Relator argues that the loan for Blecher's Board Games was wrongfully approved because Blecher's has additional access to capital through its majority owner, 3D6. Complaint, R. 32–33. However, Blecher's loan application truthfully lists 3D6 as its majority owner. R. at 50. There is no misrepresentation regarding the company's ownership structure in the application or in any other materials. R. at 50. The PPP rule and corresponding FAQs do not address whether majority ownership by another company impacts eligibility. R. at 19–21, 43–45. It was at least reasonable, if not outright compliant, for Confluence to believe that Blecher's was eligible for a loan despite the acquisition by 3D6. The loan approval does not support an inference of scienter to make a false claim.

The approval of the loan for Cedars Distillery was similarly a reasonable, if not correct, application of law. Cedars has 600 employees, and the NAICS size standards allow distilleries with fewer than 1,000 employees to qualify as small business concerns. R. at 22–23. Thus, Cedars was likely eligible for a PPP loan. *See* R. at 16, 80. Relator points to the fact that Cedars has a cocktail bar on its premises to suggest that it is better classified as a drinking place and thus not a small business concern. R. at 23, 33. However, Relator does not suggest that Cedars' primary source of revenue or business is from its cocktail bar; in fact, Relator offers no metric at

all to evaluate her assertion. Cedars also distills alcohol on its premises, and its name of "Cedars Distillery" indicates that it primarily represents itself as a distillery. It is common for distilleries to have bars on its premises, even if the bar is not its primary source of revenue or business. Importantly, even if Cedars is in fact better categorized as a drinking place than a distillery, it is at least reasonable to consider it as a distillery. Thus, there is no indication of scienter to make a false claim.

Finally, Relator argues that the loan for Mursea Hotels was incorrectly approved because the business expanded into two cities and exceeded the NAICS size standard by revenue. Complaint, R. at 33–34. This is the only loan application in which Relator pleads a defect with reference to a specific part of the PPP requirements. *Id.* However, even this allegation does not show that the approval was wrongful or unreasonable. The CARES Act expanded eligibility for hotels and restaurants with no more than 500 employees per physical location, even if they are not considered "small business concerns" under the NAICS standards. R. at 15–16. The PPP loan FAQs confirm that "any single business entity that is assigned a NAICS code beginning with 72 (including hotels and restaurants) and that employees not more than 500 employees per physical location is eligible to receive a PPP loan." R. at 45. Mursea has 700 employees across three locations. R. at 59. While the record does not clarify the distribution of the employees, there is no indication that more than 500 of the 700 total employees work at only one location. Furthermore, Mursea's total revenues were well within the NAICS size standard in 2017 and 2016. R. at 61. Even if Confluence may have been negligent for not conducting sufficient due diligence on Mursea's distribution of employees, it was at least reasonable for Confluence to infer that the hotel could have met the requirements for the PPP loan.

Despite raising issues around six loan applications, Relator has not shown how any of the approvals support an inference of intentional, deliberate, or reckless fraud. Complaint, R. at 32–36. Furthermore, these approvals occurred in the context of an emergency loan program with limited funds. R. at 19. The interim final rule implementing the PPP was only announced in April 2019. *Id*. Confluence had already begun to advise borrowers and process applications in March, before the SBA had clarified all of the lender's obligations. R. at 33, 46. During this time, multiple borrowers expressed worries about the PPP loan process. Ernest Lange from Peak Cuts stated that his application contained a missing initial only because he was afraid that funding would run out if he delayed his submission by consulting a lawyer. R. at 81. The phone call from Wanda Rees of Mursea Hotels conveyed relief and gratitude that the loan process worked out at a needed time. R. at 63–64. The early rollout of the PPP loans reflected widespread confusion about eligibility. *See* R. at 65–68. Large corporations like Shake Shack, Luby's, and 179 other public companies all received PPP loans meant for small businesses. *Id*. Given the context of a new rule that had not been fully clarified, the emergency needs of the borrowers, and public press suggesting wide eligibility, Confluence's actions are those of a company attempting to balance a flood of new information as quickly as possible to assist its customers—not of a company intending to conduct widespread fraud. Given that Confluence approved 91,496 loans before June 6, 2019, allegations of six mistakes are insufficient to show scienter, even at the pleading level. R. at 49.

Furthermore, Confluence's actions are not even close to the types of false claims that the Fifth Circuit has found facially unreasonable. In *United States ex rel. Drummond v. BestCare Lab. Servs., L.L.C.*, 950 F.3d 277, 281 (5th Cir. 2020), this Court held liable defendants who billed expenses for travel under Medicare for employees who stayed at home and did not travel

at all. The Court acknowledged that the requirements around Medicare billing were "byzantine" and "complicated," and the opinion suggested that actions might not show scienter if they were reasonable misunderstandings of the process rather than flagrant violations. *Id*. However, the misconduct in *Drummond* was too far-fetched, and "no plausible reading" of the Medicare requirements would justify billing travel time for nonexistent travel. *Id.* Here, none of the loan approvals come close to the obvious misconduct that *Drummond* held liable. In fact, Presh's actions to correct Peak Cuts' loan application and directly confirm the information to SBA demonstrate intent to follow the rules even in an ambiguous situation. R. at 81. Taken together, the loan approvals are based on reasonable interpretations of the PPP requirements and do not support an inference that Confluence intended to defraud the SBA and PPP.

B. To the extent that the applications were defective, the errors were negligent at most, which does not violate the FCA.

The FCA's scienter requirement is not met by "mere negligence or even gross negligence." *Longhi*, 575 F.3d at 468 (5th Cir. 2009); *see also U.S., ex rel., Rigsby v. State Farm Fire & Cas. Co.*, 794 F.3d 457, 478 (5th Cir. 2015), *Johnson*, 641 F. App'x at 394 (5th Cir. 2016) (holding that "at most, [defendants'] misunderstanding of CMS's requirements was negligent, which is not sufficient to attach liability). At most, the mistakes that Confluence made in the loan approvals were negligent rather than intentional, deliberate, or reckless.

The Fifth Circuit has recurrently found that even defendants who submit multiple false claims are not liable under FCA if their errors were only negligent. *See Taylor-Vick*, 513 F.3d at 231, *United States v. Priola*, 272 F.2d 589, 594 (5th Cir. 1959). In *Taylor-Vick*, 513 F.3d at 231, this Court held that a mere "pattern of erroneous billing" did not support a finding of scienter. The defendants in *Taylor-Vick* submitted false claims by overbilling certain items. *Taylor-Vick*,

513 F.3d at 231. This Court considered evidence that the defendants had underbilled other items and concluded that the "[d]efendants were merely negligent billers, which does not offend the FCA." *Id*. at 231–32. This showing of negligence was insufficient, because the relator failed to prove even one specific instance in which the defendant submitted a false claim knowingly or recklessly. *Id*. Here, similar to the defendants in *Taylor-Vick*, Confluence's loan officers made negligent oversights at most. The mistakes in the loan applications involved minor details like missing signatures and initials, or failure to confirm certain facts that could affect eligibility. R. at 80–81. The most serious missteps alleged are that Confluence neglected to confirm information about Mursea's number of employees per location and Cedars' status as a distillery versus a drinking place. *Id*. These mistakes are not even conclusive to show a pattern of false billing like the one that this Court found insufficient in *Taylor-Vick*, let alone intent to defraud. *Taylor-Vick*, 513 F.3d at 231–32. Here, there is no evidence that the loans were in fact ineligible, only that Confluence did not confirm all of the details. Absent any showing of even one instance of knowledge, proving negligence is insufficient. *Id*. This case is also similar to *United States v. Priola*, 272 F.2d 589, 594 (5th Cir. 1959), which found no liability when an employee filled out multiple purchase orders for false claims. Despite the pattern of false claims, this Court held that the government failed to establish that she had "guilty knowledge" of a plan to defraud the government. *Id*.

Relator points to the behavior of Confluence employees at the time of the loan approvals, but none of the instances show "guilty knowledge" that would survive the standards from *Priola*, 272 F.2d at 594, or *Taylor-Vick*, 513 F.3d at 231. Relator alleges that Lake dismissed her objections to the loan approvals and insinuated that she needed to focus on her own numbers. Complaint, R. at 31–33, 35–36. However, these instances of Lake's dismissive attitude do not

support the inference of a company scheme to defraud the SBA. *See Priola*, 272 F.2d at 594. More likely, Lake was concerned that Relator was denying loan applications too hastily because she did not cite a reason with respect to the NAICS standards or the PPP final rule for rejecting Blecher's application, nor did she explain why she considered Cedars Distillery to be improperly classified as a distillery. R. at 16, 32–33. Although Relator points to specific instances of Cote's negligence, most seriously the possibility that he pre-filled applications, she did not inform Lake about Cote's behavior. Complaint, R. at 31. Instead, she asked Lake a hypothetical question about whether she could fill out an application on a borrower's behalf, which did not suggest a connection to an actual employee's behavior. R. at 46. Furthermore, even the allegations about Cote are not pled with specificity. *See* Complaint, R. at 31. There is no evidence that the instance in which he pre-filled applications led to any errors in the applications, or even that those pre-filled applications were ever submitted. *Id*. Although the Fifth Circuit has not required scienter to reach an entire company in an FCA claim, there is no evidence here that any employee had scienter to defraud, let alone multiple employees. In *Rigsby*, 794 F.3d at 479, this Court rejected a defense to scienter that only three employees in the company committed fraud. This Court reasoned that such an "innocent certifier" defense would permit managers to "concoct a fraudulent scheme…without fear of reprisal" by leaving subordinates to commit the offenses. *Id*. However, the record in *Rigsby* showed abundant evidence that the employees "knowingly violated [the claim requirements], concealed evidence of wind damage, and strong-armed an engineering firm to change its reports." *Id*. at 480. Here, there is no analogous evidence that any employees collaborated in a scheme to commit fraud by covering up evidence or falsifying data. The loan applications reflect negligent errors at most. Because there is no evidence that

Confluence acted with scienter to make fraudulent claims, this Court should affirm the District Court's dismissal of the case.

II. THE DISTRICT COURT CORRECTLY HELD THAT THERE WAS NO EVIDENCE OF MATERIAL VIOLATION OF THE FCA.

A false statement is material under the FCA if it has "a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property, which requires us to evaluate the effect on the likely or actual behavior of the recipient of the alleged misrepresentation." *United States v. Hodge*, 933 F.3d 468, 473–74 (5th Cir. 2019) (internal quotation marks removed). In short, this means that the statement must have "the potential to influence the government's decisions." *U.S. ex rel. Longhi v. United States*, 575 F.3d 458, 470 (5th Cir. 2009). As the trial court noted, the Fifth Circuit has looked to three factors from *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 2003, 195 L. Ed. 2d 348 (2016) when determining materiality. These factors are:

> (1) The Government's decision to expressly identify a provision as a condition of payment and (2) evidence that the defendant knows that the Government consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular statutory, regulatory, or contractual requirement. Moreover, (3) materiality cannot be found where noncompliance is minor or insubstantial.

United States ex rel Lemon v. Nurses To Go, Inc., 924 F.3d 155, 160 (5th Cir. 2019) (internal quotation marks removed). Materiality is a holistic inquiry, and none of the three factors are dispositive. *Id*. at 161. However, the factors intentionally create a "demanding" standard to limit FCA liability to conduct beyond "garden-variety breaches of contract or regulatory violations." *Escobar*, 136 S. Ct. at 2002–03. The Supreme Court in *Escobar*

explicitly repudiated the interpretation that "any statutory, regulatory, or contractual violation is material so long as the defendant knows that the [g]overnment would be entitled to refuse payment were it aware of the violation." *Id*. at 2004. In this case, the evidence in the record fails to meet the high standard set in *Escobar*. *Id*. The alleged errors were unlikely to affect the payout decisions and did not fulfill the *Escobar* factors. *Id*.

B. Two of the alleged defects were minor or insubstantial.

Under *Escobar*, "materiality cannot be found where noncompliance is minor or insubstantial." *Id*. at 2003. Here, the errors in the applications for Liberation Booksellers and Linda Beauty Bar were minor and insubstantial, missing only a signature page and an initial respectively. R. at 80. The U.S. Attorney's Office for the Northern District of Texas found that these oversights could be cured by sending a new signer page to confirm the veracity of the information in the application. *Id*. Relator does not challenge the substance of the application or suggest that the borrowers were ineligible for the loans. Complaint, R. at 35–36. Although the signature and initials are a technical requirement on the loan application, the Supreme Court has explicitly rejected the interpretation of materiality as meaning any required element of a claim. *Escobar*, 136 S. Ct. at 2004. On the whole, Relator has not raised support for the claim that these errors would be likely to "influence the government's decisions" to fulfill materiality. *Longhi*, 575 F.3d at 470.

B. Other alleged defects were not expressly identified as conditions of payments.

Although none of the *Escobar* factors are dispositive, whether the alleged error is an express condition of payment is "certainly probative." *Lemon*, 924 F.3d at 161; *see also Escobar*, 136 S. Ct. at 2003. Errors that do not implicate express conditions of payments are generally found to be immaterial. In *United States ex rel. Porter v. Magnolia Health Plan, Inc.*,

810 F. App'x 237, 241 (5th Cir. 2020), this Court found that misrepresentations in Medicaid contracts were immaterial when they did not involve the program's explicit requirements. The relator in *Porter* claimed that a Medicaid contractor violated the FCA by using licensed practical nurses instead of registered nurses as case and care managers. *Id*. at 238. However, this Court held that the misrepresentation did not meet the materiality requirement because the Medicaid contract did not explicitly require case and care managers to be registered nurses, even if patients could have been misled by the practice. *Id*. at 242.

The other disputed loans here similarly do not violate express conditions of the loan application. First, the loan for Peak Cuts was correctly approved after Presh submitted the cured version of the application and contacted the SBA to confirm the information. R. at 81. Second, the application for Blecher's Board Games correctly represented the ownership by 3D6 and did not conflict with express conditions of payments. R. at 50. Even if Relator personally felt that Blecher's should not have received a loan because of its access to additional capital through 3D6, no language in the PPP rule expressly disqualifies companies based on such access. R. at 19–21, 32–35.

Third, the loan approval for Cedars Distillery was likely correct based on the NAICS standard for distilleries. *See* R. at 22–23. Relator does not offer support for reclassifying Cedars as a drinking place instead of a distillery. *See* Complaint, R. at 33. Even if Cedars could be reasonably construed as either one, the loan application disclosed the number of employees as 600 and did not falsify answers to any express condition on the application. R. at 56–57.

The loan to Mursea was similar to the previous cases. The company most likely met the PPP eligibility requirements based on its number of employees per location, and Relator has offered no evidence that it did not. *See* R. at 33–34, 45, 59. Mursea disclosed its number of

employees and revenues truthfully on the application, and SBA could have declined to disburse the loan if it were not eligible. *See* R. at 59, 81.

Although the absence of conflict with express conditions is not dispositive, it strongly suggests immateriality. The alleged errors within the loan applications are most similar to the facts of *Porter*, 810 F. App'x at 242, which held that information is not material simply because it has the potential to be misleading.

C. None of the alleged defects were likely to affect the government's payment decisions.

Finally, there is no evidence in the record that any of the alleged defects were likely to affect the payout scheme. The second *Escobar* factor indicates that a condition is immaterial if the government continues to make payments to entities who do not meet the condition. *Escobar*, 136 S. Ct. at 2002–03. The Fifth Circuit has affirmed that if the government pays out claims regardless of whether a condition is met, then immateriality is suggested. *United States ex rel. Patel v. Catholic Health Initiatives*, 792 F. App'x 296, 301 (5th Cir. 2019). This Court in *Patel* considered a case in which a hospital system "continued to submit claims and receive reimbursement, even after a court determined that the entity designated as owner of the Hospital was not really the owner." *Id.* This Court held that the continued payout suggested that "the government [did] not care who the 'rightful' owner of the Hospital [was]," and thus there was no material violation of the FCA. *Id*.

Similarly here, the SBA not only paid out the loans that Confluence processed, but it paid out loans to an assortment of public companies that shared conditions with the companies involved in this case. *See* R. at 65–68. PPP loans were distributed to companies with significantly higher revenues than Mursea Hotels and larger parent companies than 3D6. R. at

67–68. Loans were given to household names, including Shake Shack and Luby's, which pulled $594.5 million and $323.5 million in annual revenues respectively—far higher than Mursea's $36 million. *Id*. Relator has failed to show that the mistakes she alleged would have materially (or at all) impacted PPP disbursal, and the evidence in the record is insufficient to draw that reference. Because there is no evidence that the alleged false claims were material, this Court should affirm the lower court's dismissal of the case.

CONCLUSION

The district court was correct to dismiss the case on the merits for failure to sufficiently plead the elements of scienter and materiality. First, there is no evidence that Confluence had the requisite scienter for an FCA violation. The evidence in the record suggests that any defects in the approved loan applications were based on reasonable interpretations of the PPP requirements or, at most, individualized instances of negligence insufficient for FCA liability. *See Longhi*, 575 F.3d at 480. Second, Relator fails to plead that the defects in the loan applications were material. All of the alleged errors were either minor and non-substantive, or fell outside of the explicit conditions of the PPP loans; none of them would have impacted the government's payment decisions. *See Escobar*, 136 S. Ct. at 2003–04. This Court should affirm the district court's dismissal of the case on the elements of scienter and materiality.

Applicant Details

First Name	**Daniel**
Middle Initial	**J**
Last Name	**Lee**
Citizenship Status	**U. S. Citizen**
Email Address	**daniel.james.lee@columbia.edu**
Address	**Address** Street **424 5th Street, Apartment 1** City **Brooklyn** State/Territory **New York** Zip **11215** Country **United States**
Contact Phone Number	**6104014445**

Applicant Education

BA/BS From	**New York University**
Date of BA/BS	**January 2013**
JD/LLB From	**Columbia University School of Law** **http://www.law.columbia.edu**
Date of JD/LLB	**May 20, 2020**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Columbia University Journal of Transnational Law**
Moot Court Experience	**Yes**
Moot Court Name(s)	**American Intellectual Property Lawyers Association (AIPLA) Moot Court**

Bar Admission

Admission(s)	**New York**

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Loengard, Philippa
psl7@columbia.edu
2128549869
McCrary, Justin
jrm54@columbia.edu
Janghorbani, Alexander
mstefanick@cgsh.com

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Daniel J. Lee
424 5th Street
Apartment 1
Brooklyn, NY 11215

The Honorable Kiyo A. Matsumoto
United States District Court
Eastern District of New York
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room S905
Brooklyn, NY 11201

April 30, 2023

Dear Judge Matsumoto,

I am a litigation associate at Cleary Gottlieb Steen & Hamilton LLP and a 2020 graduate of Columbia Law School. I write to apply for a clerkship beginning in 2024 or any term thereafter.

I am confident that I would contribute meaningfully to the work of Your Honor's chambers. Since joining Cleary Gottlieb, I have represented numerous clients in federal court proceedings, including an investment fund manager in parallel civil and criminal cases alleging violations of the federal securities laws and bankruptcy code and an international bank in civil litigation related to its U.S. sanctions violations, among others. I have gained substantial research and writing experience, drafting memoranda of law in support of dispositive and non-dispositive motions, internal and client-facing research memoranda, and articles for publication. I look forward to the opportunity to apply my experience and further broaden my skillsets in my role as a judicial clerk.

Enclosed please find my resume, law school transcript, and writing sample, as well as letters of recommendation from the following individuals:

Alex Janghorbani – Senior Attorney, Cleary Gottlieb Steen & Hamilton LLP
(212) 225-2149; ajanghorbani@cgsh.com

Justin McCrary – Paul J. Evanson Professor of Law, Columbia University
(212) 854-7992; jmccrary@law.columbia.edu

Pippa Loengard – Deputy Director, Kernochan Center for Law, Media and the Arts
(212) 854-9869; Ploeng1@law.columbia.edu

Thank you for considering my application. Please do not hesitate to contact me at (610) 401-4445 or daniel.james.lee@columbia.edu should you need any additional information.

Sincerely,

Daniel J. Lee

DANIEL J. LEE

424 5th St., Apt. 1, Brooklyn, NY 11215 • +1 (610) 401-4445 • daniel.james.lee@columbia.edu

EDUCATION

Columbia Law School, New York, NY
Juris Doctor, received May 2020
Honors: James Kent Scholar, 2018-2019; Harlan Fiske Stone Scholar, 2017-2018 and 2019-2020
Best in Class Award (awarded to student with top examination):
- International Law, Prof. Thomas Lee, Fall 2018

Dean's Honors Award (awarded to top student, or, for large classes, top 3-5%, while Columbia's COVID-19 mandatory pass/fail grading policy was in effect):
- Colloquium on Contract & Economic Organization, Prof. Robert Scott, Spring 2020
- Negotiation Seminar, Prof. Daniel Serviansky, Spring 2020

Activities: *Columbia Journal of Transnational Law*, Articles Editor, 2019-2020
Teaching Fellow:
- Antitrust & Trade Regulation, Prof. Justin McCrary, Fall 2019
- Legal Writing, Prof. Ilene Strauss, Spring 2019

Columbia Outlaws LGBTQ+ Law Students Organization

New York University, New York, NY
Bachelor of Fine Arts in Drama, *with honors*, received January 2013
Honors: Lee Strasberg Centennial and Rudin Scholarships for Academic Excellence

BAR ADMISSION: New York State Bar, December 2021

EXPERIENCE

Cleary Gottlieb Steen & Hamilton, New York, NY
Litigation Associate Summer 2019 (summer law clerk), January 2021-Present
Practice emphasis on civil litigation, regulatory enforcement, and white-collar defense. Drafted various filings, including memorandum of law in support of motion for summary disposition before the SEC, sentencing memorandum on behalf of federal criminal defendant, and cross-border discovery dispute motion papers. Carried out discovery in complex federal class action. Co-wrote article on consequences of CFPB's 2018 reorganization, published in Real Estate Finance Journal's Fall 2021 edition, and chapter on SEC litigation for upcoming book.

Blueprint Test Preparation, New York, NY
LSAT Instructor and Tutor January 2016-November 2020
Provided group and one-on-one LSAT instruction. Led law school application workshops and admissions panels.

Kernochan Center for Law, Media & the Arts, New York, NY
Research Assistant Summer 2018
Wrote research memoranda on current intellectual property law issues. Drafted materials for presentation at International Literary & Artistic Association (ALAI) 2018 Congress promoting international copyright standards.

Broadcast Music, Inc. (BMI) Writers Workshop, New York, NY
Freelance Songwriter and Librettist September 2013-August 2017
Wrote musical theater songs and libretti. Participated in the invitation-only BMI Writers Workshop, the premier training program for musical theater composers.

Integrated Educational Services/ILEX Publishing, New York, NY
Instructor, Writer, Editor January 2015-August 2017
Taught SAT preparation and essay writing classes. Wrote and edited content for test preparation book series. Devised new math and verbal curricula to anticipate The College Board's 2016 SAT redesign.

Bareburger, New York, NY
Bartender/Counter Service April 2013-June 2014
Provided food and beverage service to a high volume of restaurant patrons. Managed take-out and delivery orders across various online ordering platforms. Led new employee training.

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CLS TRANSCRIPT (Unofficial)

07/30/2020 00:20:14

Program: Juris Doctor

Daniel J Lee

Spring 2020

Due to the COVID-19 pandemic, mandatory Credit/Fail grading was in effect for all students for the spring 2020 semester.

Course ID	Course Name	Instructor(s)	Points	Final Grade
L8233-1	C. Contracts and Economic Organization	Scott, Robert	1.0	CR
L6238-1	Criminal Adjudication	Shechtman, Paul	3.0	CR
L6425-1	Federal Courts	Funk, Kellen Richard	4.0	CR
L6640-2	Journal of Transnational Law Editorial Board		1.0	CR
L6776-1	Moot Court Student Judge	Strauss, Ilene	1.0	CR
L8115-6	S. Negotiation Workshop [Minor Writing Credit - Earned]	Serviansky, Daniel Stern	3.0	CR

Total Registered Points: 13.0

Total Earned Points: 13.0

Fall 2019

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6241-2	Evidence	Roth, Jessica	3.0	A-
L6640-2	Journal of Transnational Law Editorial Board		1.0	CR
L6169-1	Legislation and Regulation	Doerfler, Ryan D	4.0	A-
L6274-2	Professional Responsibility	Fox, Michael Louis	2.0	A-
L6685-1	Serv-Unpaid Faculty Research Assistant	Strauss, Ilene	2.0	CR
L6822-1	Teaching Fellows	McCrary, Justin	3.0	CR

Total Registered Points: 15.0

Total Earned Points: 15.0

Spring 2019

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6341-1	Copyright Law	Ginsburg, Jane C.	4.0	A-
L6256-1	Federal Income Taxation	Raskolnikov, Alex	4.0	A-
L6640-1	Journal of Transnational Law		0.0	CR
L6781-1	Moot Court Student Editor II	Strauss, Ilene	2.0	CR
L9090-1	S. Law and Theatre	Chaikelson, Steven	2.0	A
L6822-1	Teaching Fellows	Strauss, Ilene	1.0	CR

Total Registered Points: 13.0

Total Earned Points: 13.0

Fall 2018

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6293-1	Antitrust and Trade Regulation	Wu, Timothy	3.0	A
L6231-1	Corporations	Hamdani, Assaf	4.0	A
L6269-1	International Law	Lee, Thomas	3.0	A
L6640-1	Journal of Transnational Law		0.0	CR
L6681-1	Moot Court Student Editor I	Strauss, Ilene	0.0	CR
L6674-1	Workshop in Briefcraft [Major Writing Credit - Earned]	Strauss, Ilene	2.0	CR

Total Registered Points: 12.0

Total Earned Points: 12.0

Spring 2018

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6863-1	AIPLA Moot Court	DeMasi, Timothy; Lebowitz, Henry; Strauss, Ilene	0.0	CR
L6213-1	American Legal History	Ponsa-Kraus, Christina D.	3.0	A-
L6105-1	Contracts	Scott, Robert	4.0	A
L6108-1	Criminal Law	Wu, Timothy	3.0	B+
L6121-12	Legal Practice Workshop II	DeMasi, Timothy; Lebowitz, Henry	1.0	P
L6116-3	Property	Heller, Michael A.	4.0	A

Total Registered Points: 15.0

Total Earned Points: 15.0

Fall 2017

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-4	Civil Procedure	Huang, Bert	4.0	B+
L6133-4	Constitutional Law	Bobbitt, Philip C.	4.0	B
L6113-4	Legal Methods	Sovern, Michael I.	3.0	CR
L6115-17	Legal Practice Workshop I	Heller, Deborah; Lee, Yuanchung	2.0	HP
L6118-2	Torts	Underhill, Kristen	4.0	A-

Total Registered Points: 17.0

Total Earned Points: 17.0

Total Registered JD Program Points: 85.0

Total Earned JD Program Points: 85.0

Best In Class Awards

Semester	Course ID	Course Name
Fall 2018	L6269-1	International Law

Dean's Honors

A special category of recognition in Spring 2020 awarded to the most outstanding students in each course (top 3-5%).

Semester	Course ID	Course Name
Spring 2020	L8233-1	C. Contracts and Economic Organization
Spring 2020	L8115-6	S. Negotiation Workshop

Honors and Prizes

Academic Year	Honor / Prize	Award Class
2019-20	Harlan Fiske Stone	3L
2018-19	James Kent Scholar	2L
2017-18	Harlan Fiske Stone	1L

Pro Bono Work

Type	Hours
Mandatory	40.0

May 01, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

Daniel Lee was my research assistant in the summer of 2018, between his first and second years at Columbia Law School. As such, he had to work on a range of issues touching on copyright and related problems in art law although he had not yet done any coursework beyond the basic first-year courses. He took on the challenge with enthusiasm and performed extremely well. Some of his assignments, especially early on, were fairly straightforward – for example, reading and commenting on an academic text. Others, like his project on the moral rights of authors and artists in four European countries and Australia, required a great deal of research. I was impressed not only with the quality of his analysis but with the clarity of organization of a lot of data and the breadth of his research. The memorandum provided a description of the applicable law in each country followed by carefully summarized case notes. At the end of it was a section entitled “Further Reading” with links to articles in law journals and newspapers and another section with links to various copyright codes, acts, and amendments, which he had of course read. It was an extraordinarily thorough piece of work and as such very useful. He completed a number of other assignments over the summer, all done with clarity and accuracy and all completed in good time. He writes well – and he is an accomplished proofreader, no small talent!

I don’t have to comment on Daniel’s record at Columbia. Obviously his grades were excellent or he would not have been selected as a research assistant. Over the course of three years he was both a James Kent and a Harlan Fiske Stone scholar; the first recognizes students whose grade average is 3.8 or better; the second requires a 3.410 out of 4.0. He received other honors, among them a “Best in Class” award in international law, and he served as a teaching fellow in two separate courses. I did not have Daniel as a student in my course on Art Law, so I cannot comment on his classroom performance. But one of the things I most remember about him was his willingness to go beyond what was required. For instance, if he was between assignments, without my asking he made himself available to help out my other research assistant on her current project. It made for a pleasant work atmosphere, which is not always the case.

Daniel has spent his professional career at Cleary Gottlieb and has worked on a variety of matters as an Associate there. Of all the diverse assignments he has received, it is his work with government regulatory agencies that has most interested him. This dovetails with Daniel’s enthusiasm for research and policy and his established interest in areas such as antitrust (a course for which he was a teacher’s assistant in law school.) I think time as a clerk will expose Daniel to a variety of matters, including, perhaps, some involving government enforcement. This will allow Daniel to evaluate whether this is an area in which he wishes to focus his career or shed light on other areas of the law which may interest him even more.

In short, based on his work for me and on his post-graduation career, Daniel would prove to be an admirable clerk.

Sincerely,

Pippa Loengard
Director, Kernochan Center for Law, Media and the Arts
and Lecturer-in-Law
Columbia Law School

Philippa Loengard - psl7@columbia.edu - 2128549869

May 01, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am pleased to recommend Daniel Lee for a clerkship in your chambers. As the Paul J. Evanson Professor of Law at Columbia Law School, I supervised Daniel in his capacity as a teaching assistant for my Fall 2019 Antritrust & Trade Regulation class. He was a valuable resource both to me and my students, and I am grateful for the support he provided. I know Daniel to be a bright student and diligent worker, and I am confident he will make an excellent law clerk.

Daniel's primary responsibility as a TA was serving as an academic resource for the students in my class. Not only did he demonstrate a strong understanding of the material (indeed, I selected Daniel for the position in part based on a recommendation from my colleague at Columbia, who identified him as one of the strongest students in his Fall 2018 Antitrust class), but he was especially attentive to the students' progress and worked to assist them in learning the material. Along with his co-TA, he led weekly review sessions, for which he prepared PowerPoint presentations, summaries of the prior week's material, and hypothetical fact patterns for additional reinforcement. Outside of the review sessions, he and his co-TA held "office hours" for one-on-one meetings where students could raise specific questions not addressed during class time. He also acted as a liaison between me and the students, monitoring student comprehension of the course material, elevating to me questions that arose in TA review sessions, and making suggestions regarding which portions of the material may warrant further in-class discussion.

Daniel also provided valuable administrative assistance, including managing the list of students to be called on for the day's classroom instruction, monitoring student attendance, and handling other administrative tasks that arose. In this regard, he was reliable and required little oversight; I appreciated that I could trust him to ensure that the class ran smoothly from an administrative standpoint.

In sum, Daniel was a valuable asset to my Antitrust class, and I am confident he will be an asset to your chambers. I recommend him without hesitation. If I can provide any further information, please feel free to contact me at (212) 854-7992 or jmccrary@law.columbia.edu.

Sincerely,

Professor Justin McCrary

CLEARY GOTTLIEB STEEN & HAMILTON LLP

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May 2, 2023

The Honorable Kiyo A. Matsumoto
United States District Court
Eastern District of New York
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East
Brooklyn, NY 11201

Re: Recommendation in Support of Judicial Clerkship Application of Daniel Lee

Dear Judge Matsumoto:

It is my pleasure to provide this letter of recommendation in support of Daniel Lee's application for a clerkship in Your Honor's chambers. By way of background, I am counsel at Cleary Gottlieb Steen & Hamilton LLP, and a former investigative staff member and senior trial counsel at the Securities and Exchange Commission, where I served for nearly nine years in the Division of Enforcement's New York regional office. Since Daniel joined Cleary Gottlieb, I have supervised him on a number of projects within the firm's litigation and white collar enforcement practice. Most notably, Daniel and I worked together on a multi-faceted matter involving parallel criminal and civil cases in federal court and a follow-on administrative proceeding before the SEC. I very much enjoyed working with Daniel. I have found him to be a conscientious and capable lawyer with superior research, writing, and analytical abilities and a collaborative team player who takes on a variety of tasks with enthusiasm.

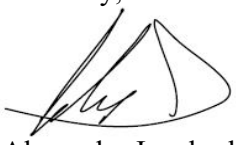
In particular, I had the opportunity to supervise Daniel on a project to prepare a motion for summary disposition in the above-referenced SEC administrative proceeding. I was very impressed with the quality of his work. Having become familiar with the facts of the case through his prior work on the parallel federal court litigations, Daniel volunteered to take the lead on conducting the underlying research and drafting the memorandum of law in support of summary disposition in the administrative proceeding. His work on the brief was first rate, requiring only minimal editing, particularly for work product by someone at his level of seniority. His writing demonstrated a thorough understanding of the relevant legal framework and nuances of the case, was well-organized and persuasive, and captured the tone we discussed in our preparatory meetings. Because of his strong work on the brief, I subsequently requested Daniel's assistance on a project to prepare a book chapter concerning litigations involving the

SEC. Again Daniel took the lead on conducting the requisite research and preparing the initial draft, and again he provided the team high-quality work product.

Beyond these specific drafting projects, Daniel has handled with enthusiasm a number of other tasks in connection with the above-described matters, from additional research assignments to case management and administrative matters. He is a diligent associate who takes ownership over tasks both big and small and consistently provides timely, accurate, and thorough work product.

I am happy to recommend Daniel for a clerkship. I have no doubt he will provide valuable contributions as a clerk for the federal judiciary. Please do not hesitate to reach out to me at my contact information listed below if you would like to discuss further.

Sincerely,



Alexander Janghorbani
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Cleary Gottlieb Steen & Hamilton LLP
ajanghorbani@cgsh.com
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New York, New York 10006
Telephone: (212) 225-2149

Writing Sample

Enclosed please find excerpts of a brief I prepared in connection with my employment at Cleary Gottlieb. The brief is a memorandum of law in support of summary disposition in an SEC administrative proceeding, in which we oppose the SEC's request for a permanent industry bar of the respondent following his federal criminal conviction and settlement in a parallel civil enforcement action. The following writing sample reflects the finalized version of the brief filed on the public docket, with certain modifications and omissions to meet Your Honor's page length guidelines. I received permission from my employer to submit this brief as a writing sample.

I substantially drafted the entire brief, which was filed following only minimal edits by supervising attorneys at the firm. I also conducted the underlying legal research and managed the collection of the numerous support letters cited in the brief and filed as accompanying exhibits.

STATEMENT OF FACTS

On February 3, 2021, Mr. Daniel B. Kamensky pled guilty to a one count information charging violation of 18 U.S.C. § 152(6) (bribery and extortion in connection with bankruptcy). On May 7, 2021, Mr. Kamensky was sentenced to six months of imprisonment followed by six months of supervised release under home confinement and fined $55,000. On September 10, 2021, Mr. Kamensky voluntarily agreed to settle the Securities and Exchange Commission's ("SEC" or "Commission") parallel civil case, agreeing to be permanently enjoined from violating Section 17(a) of the Securities Act of 1933 (the "Securities Act") with no further penalty or disgorgement. On September 21, 2021, Mr. Kamensky was suspended from appearing as an attorney before the Commission pursuant to SEC Rule of Practice 102(e)(2), and has agreed not to contest this suspension.

On the basis of Mr. Kamensky's conviction, the Commission entered an Order Instituting Proceedings ("OIP") pursuant to Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act"), 15 U.S.C. § 80b-3(f), on September 21, 2021 to determine what, if any, further remedial action would be appropriate and in the public interest. *Daniel B. Kamensky*, Investment Advisers Act Release No. 5869 (Sept. 21, 2021). On October 29, 2021, the SEC Division of Enforcement ("Division") filed a motion for summary disposition, arguing that Mr. Kamensky should be "permanently barred from association with any investment adviser, broker-dealer, or other industry professionals enumerated in Advisers Act Section 203(f)." Division Br. at 8.[1]

The conduct underlying these prior proceedings, and which brings Mr. Kamensky before the Commission today, was limited to a few hours on one day, July 31, 2020, in the course of

[1] "Division Br." refers to the Division of Enforcement's Motion for Summary Disposition Against Respondent Daniel B. Kamensky and Memorandum of Law in Support.

two phone calls to a trader at Jefferies. The context surrounding these events is important. For years prior, Mr. Kamensky, through his investment firm Marble Ridge Capital LP ("Marble Ridge"), had been pursuing fraudulent conveyance claims against the private equity owners of Neiman Marcus Group LTD LLC ("Neiman Marcus"), who in 2018 had transferred its MyTheresa subsidiary out of the reach of Neiman Marcus's creditors for no consideration. *See* Statement of the Acting United States Trustee at 5, *In re Neiman Marcus Grp. LTD LLC*, No. 20-32519 (DRJ) (Bankr. S.D. Tex. Aug. 19, 2020), ECF No. 1485 ("US Trustee Statement"). After Neiman Marcus commenced Chapter 11 bankruptcy proceedings, Mr. Kamensky continued those efforts, almost single-handedly, on behalf of and to the benefit of all the unsecured creditors of Neiman Marcus through his representation of Marble Ridge as a member of Neiman Marcus's Unsecured Creditors' Committee (the "Committee"). *See Ex. 6 (Notice of Marble Ridge's Appointment to Committee)*.

In late July 2020, the unsecured creditors and Neiman Marcus were engaged in intense, time-pressured negotiations regarding the terms of a settlement of the MyTheresa claims. *See* Courtroom Minutes, *In re Neiman Marcus Grp. LTD LLC*, No. 20-32519 (DRJ) (Bankr. S.D. Tex. July 30, 2020), ECF No. 1399 (granting approval of Debtor's Disclosure Statement and scheduling a hearing for August 3, 2020 "to discuss any remaining issues"). On July 31, 2020, in moments of extreme stress and time pressure, Mr. Kamensky reacted during a phone call with Jefferies about their interest in bidding on the assets that were subject to the settlement, directing Jefferies not to put in a bid. *See Ex. 2 (Sentencing Tr.)* 28:20-29:1 ("[T]he pressure of that day has to be understood in the context of something he had been dealing with for literally years . . . He believed he was doing a good thing for Marble Ridge and for other unsecured creditors."). He believed that during this first call

with Jefferies he had explained the lengthy history and background about the Neiman Marcus bankruptcy and the reasons why Jefferies's last-minute insertion into the process could jeopardize the delicate balance. That is why Mr. Kamensky reacted with shock when he learned that Jefferies believed Mr. Kamensky had threatened them. It was in that state of shock that Mr. Kamensky made a second call to Jefferies, during which, in trying to explain himself further, he made matters worse.

Ever since those few hours on that day, Mr. Kamensky has taken full responsibility for his wrongful actions and worked to make amends. Acknowledging the gravity of his mistakes, he promptly withdrew from the Committee and encouraged Jefferies to bid, which they did, as did others. Although doing so would further expose him to civil and criminal liability, he voluntarily testified before the U.S. Trustee in connection with its investigation into the events of July 31, 2020. He settled his personal claims with the Neiman Marcus estate. He made the difficult decision to close his business, Marble Ridge, appointing independent liquidators to responsibly wind down the fund. And, significantly, he waived indictment and pled guilty to a criminal charge, for which he was sentenced to a term of incarceration and ordered to pay a substantial fine.

Outside of those few hours on July 31, 2020, Mr. Kamensky has lived—and continues to live—a life characterized by integrity, honesty, and kindness for others. As a testament to Mr. Kamensky's character, over 100 individuals from all parts of his life wrote letters of support in connection with his sentencing.[2] His professional colleagues and business rivals

[2] The sentencing support letters cited herein are attached as Exhibits 16-48 and 50-51 to this brief. All 103 support letters submitted in connection with Mr. Kamensky's sentencing are attached as exhibits to Mr. Kamensky's sentencing memorandum. *See* Sentencing Submission of Defendant Daniel B. Kamensky, *United States v. Kamensky*, No. 21-cr- 0067 (DLC) (S.D.N.Y. Feb. 3, 2021), ECF No. 27. The support letters are available at ECF Nos. 27-1 to 27-103, and an exhibit index is included at ECF No. 27-119.

alike value him as a trusted and respected member of the professional bankruptcy community. His former employees likewise speak highly of him. In his personal life, Mr. Kamensky is a dedicated friend and family member.

At his sentencing hearing, the Honorable Denise L. Cote agreed with the assessment of Mr. Kamensky's professional and personal communities. She acknowledged that the events of July 31, 2020 were an aberration for Mr. Kamensky and that Mr. Kamensky is not likely to reoffend, concluding that "the conduct in which he engaged was not foreshadowed by the way he had lived the rest of his life." *Ex. 2 (Sentencing Tr.)* 27:22-23. Judge Cote further explained, "I don't find that there is a need here to provide a sentence to the defendant that guards against a repeat of this activity" because "[t]here is little risk . . . that [Mr. Kamensky] will violate the law again," *id.* at 29:25-30:1-5, but nevertheless imposed a sentence that included a term of incarceration expressly to serve the goal of "general deterrence." *Id.* at 29:17. Judge Cote underscored her judgment that Mr. Kamensky is "a good man who has lived a life with an abundance of love, of kindness to others, and generosity." *Id.* at 30:6-7.

ARGUMENT

I. Mr. Kamensky Agrees That Summary Disposition Is Appropriate

Mr. Kamensky agrees with the Division that there is no genuine issue with regard to any material fact and that this matter can be resolved on summary disposition. However, Mr. Kamensky submits that summary disposition should be granted in his favor. For the reasons explained in detail below, it would not serve the public interest to impose any associational bar on Mr. Kamensky. However, to the extent the Commission concludes that an additional sanction is warranted, Mr. Kamensky submits that nothing more than a twelve-month suspension would be necessary or appropriate.

II. Legal Standard

The Commission is authorized to impose sanctions against individuals associating with investment advisers only when such sanctions would be "in the public interest." 15 U.S.C. § 80b-3(f). "A collateral bar, however, is the severest of sanctions," *Khaled A. Eldaher*, Initial Decision Release No. 857, 2015 WL 4881988, at *11 (Aug. 17, 2015), *accepted as final at Khaled A. Eldaher*, Exchange Act Release No. 76132, 2015 WL 5935347 (Oct. 13, 2015), and "permanent exclusion from the industry is 'without justification in fact' unless the Commission specifically articulates compelling reasons for such a sanction." *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979) (quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 112-13 (1946)).

Specifically, the Commission considers six factors in determining whether it would serve the public interest to impose the proposed sanction:

> [T]he egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations.

Id. As part of this inquiry, it is relevant whether there is "a reasonable likelihood that a particular violator cannot ever operate in compliance with the law." *Id.* (quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 112-13 (1946)). Accordingly, the Commission must not make a "conclusive presumption of future wrongdoing on the basis of past misconduct." *Id.* The Commission also takes into account "the degree of harm to investors and the marketplace resulting from [respondent's] violation." *Marshall E. Melton*, Investment Advisers Act Release No. 2151, 2003 WL 21729839, at *2 (July 25, 2003). Finally, the Commission considers to what extent imposing the proposed sanction will serve the goal of

general deterrence. *Schield Mgmt. Co.*, Exchange Act Release No. 2477, 2006 WL 231642, at *8 (Jan. 31, 2006). "[T]he Commission's inquiry into the appropriate sanction to protect the public interest is a flexible one, and no one factor is dispositive." *David Henry Disraeli and Lifeplan Assocs., Inc.*, Exchange Act Release No. 8880, 2007 WL 4481515, at *15 (Dec. 21, 2007).

In balancing the various public interest factors in the context of an administrative proceeding brought on the basis of a criminal conviction, the Commission has given significant weight to the court's judgment in the underlying criminal action. *See Maher F. Kara*, Initial Decision Release No. 979, 2016 WL 1019197, at *7 (Mar. 15, 2016) ("In the judgment of the court in *United States v. Kara*, [respondent] is unlikely to reoffend. Thus a permanent bar is unnecessary."); *Mark Megalli*, Initial Decision Release No. 1253, 2018 WL 3199049, at *7 (May 31, 2018) ("On balance, considering the court's finding that Megalli is unlikely to reoffend and that his remorse is sincere, a twelve-month suspension is an appropriate sanction.").

III. The Steadman Factors Weigh Against Imposing an Associational Bar Against Mr. Kamensky

A. Mr. Kamensky's conduct was not sufficiently egregious to weigh in favor of a permanent bar, and was an isolated incident, occurring entirely over the course of a few hours on a single day

[Omitted from writing sample.]

B. Mr. Kamensky quickly recognized the wrongfulness of his actions and has taken numerous steps to make amends, including making multiple sincere assurances against future violations

Immediately following the events of July 31, 2020, Mr. Kamensky recognized the wrongfulness of his conduct, assuming full responsibility for his actions and taking affirmative steps to make amends. Accordingly, he has provided numerous assurances, some legally

binding, against future misconduct, which the sentencing court found to be sincere and credible. Specifically, Mr. Kamensky has taken the following actions:

First, Mr. Kamensky acknowledged his wrongdoing and resigned from the Committee on August 1, 2020. *See* U.S. Trustee Statement at 24-25. He encouraged Jefferies to place a bid, which it did, as did others in the following days.

Second, Mr. Kamensky cooperated fully with the U.S. Trustee's investigation into the events of July 31, 2020, volunteering to testify in the face of potential exposure to civil and criminal liability—both of which materialized. He began his testimony before the U.S. Trustee by apologizing multiple times for his conduct on that day. *See Ex. 7 (D. Kamensky Trustee Tr.)* 6:3-7, 7:16-20.

Third, as part of a court-approved settlement in the Neiman Marcus bankruptcy, Mr. Kamensky agreed never again to serve on any official bankruptcy committee, to subordinate all of his personal claims in the bankruptcy to those of other creditors, to donate $100,000 to designated charities, and to perform 200 hours of community service. *See Ex. 1 (In re Neiman Marcus Settlement Order)*. He completed well over 200 volunteer hours prior to his surrender date, providing assistance at local food pantries and soup kitchens. *Ex. 43 (Singh Ltr.)*.

Fourth, Mr. Kamensky made the difficult decision to close his business, appointing independent managers to liquidate Marble Ridge in a responsible manner. Christopher Kennedy, one of the independent managers overseeing the liquidation, wrote that Mr. Kamensky has worked closely with the liquidators throughout the wind down, "providing an unparalleled degree of cooperation, collaboration, and transparency." *Ex. 52 (Kennedy Supplemental Ltr.)* at 2.

Fifth, on September 10, 2021, Mr. Kamensky reached a settlement with the SEC in the parallel civil case, consenting to an injunction against violations of Section 17(a) of the Securities Act. *See Ex. 3 (SEC v. Kamensky Consent)*.

Finally, and most significantly, on February 3, 2021, Mr. Kamensky pled guilty to a one count violation of 18 U.S.C. § 152(6). *See supra* at 2. On May 7, 2021, he was sentenced to six months' imprisonment followed by six months' home confinement and ordered to pay a $55,000 fine, which he promptly paid. *See supra* at 2.

Speaking at his sentencing hearing, Mr. Kamensky once again apologized and took full responsibility for his conduct. *Ex. 2 (Sentencing Tr.)* 24:12-13 ("Your Honor, I want to first apologize to everyone affected by the terrible mistakes I made on July 31st."); *id.* at 24:21-22 ("There is no excuse for my behavior and I am deeply regretful and embarrassed for my conduct that day."). Judge Cote "accept[ed]" that "[Mr. Kamensky] is deeply remorseful" and in particular "commend[ed]" him on his efforts to make amends. *Id.* at 27:21-28:1. Satisfied by the credibility of his assurances against future violations, Judge Cote concluded, "I don't find that there is a need here to provide a sentence to the defendant that guards against a repeat of this activity." *Id.* at 29:25-30:2.

Further supporting the court's conclusion that Mr. Kamensky has accepted responsibility and made assurances against future violations are the numerous letters from family, friends, and colleagues, describing the regret he has privately expressed to them. *See, e.g.*, *Ex. 46 (Goode Ltr.)* at 1 ("Dan has personally expressed his deep regret for his actions . . . . Dan has acknowledged and accepted his responsibility for his mistakes."); *Ex. 39 (Shams Ltr.)* at 2 ("In my personal conversations with Dan, I find him to be truly penitent and ready to accept the consequences of his actions."). Consistent with his character, Mr.

Kamensky has been more concerned about how his conduct has affected those around him than it has himself. *Ex. 47 (Carr Ltr.)* at 1 ("The one thing he kept talking about was how his actions have hurt his family and friends. Not about how it may have hurt him or his career. But, how it was hurting those he cares about."). As his wife Amy reported, since that day, he has been "thoroughly consumed by remorse and regret" and "distraught by the ripple effect of his mistake." *Ex. 48 (Blumenfeld Kamensky Ltr.)* at 6-7.

The Division's argument that Mr. Kamensky has recognized the wrongful nature of his conduct and made assurances against future violations with respect to the criminal action but "has made no similar effort" with respect to the SEC's civil action or this administrative proceeding, Division Br. at 12, is not consistent with the facts or the law. It is undisputed that the criminal conviction, the civil action, and the instant administrative proceeding all arose from, as the Commission alleges in the OIP, "substantially the same facts and circumstances." *Ex. 5 (OIP)* ¶ 5. Moreover, the Division's analysis of this *Steadman* factor does not match Commission precedent. *See, e.g.*, *Megalli*, 2018 WL 3199049, at *7 (finding that respondent "affirmatively recognized the wrongful nature of his conduct" in the context of a follow-on administrative proceeding by, *inter alia*, pleading guilty in the underlying criminal proceeding). In any event, Mr. Kamensky *did* provide assurances in connection with the SEC civil action, consenting to an injunction against violations of Section 17(a) of the Securities Act. The Division does not articulate why the aforementioned remedial actions taken by Mr. Kamensky since July 31, 2020 do not constitute sufficient recognition of the wrongfulness of his conduct as it relates to the Commission, nor does it explain what further steps Mr. Kamensky would need to take in order to demonstrate such recognition.[3]

[3] Further failing to acknowledge Mr. Kamensky's acceptance of responsibility, the Division cites to an incomplete version of an interview Mr. Kamensky gave to Petition Bankruptcy Blog, attached as Exhibit 11 to the Declaration

Indeed, Mr. Kamensky's repeated recognition of the wrongful nature of his conduct and the numerous credible assurances he has provided against future violations weigh heavily in favor of granting summary disposition in his favor.

C. The fact that Mr. Kamensky does not pose a risk of engaging in future violations alleviates any concern that Mr. Kamensky's occupation may present opportunities for such violations

[Omitted from writing sample.]

IV. Mr. Kamensky's Conduct Resulted in No Harm to the Unsecured Creditors of Neiman Marcus

[Omitted from writing sample.]

V. The Commission's Goal of General Deterrence Has Already Been Served Multiple Times Over in This Case

[Omitted from writing sample.]

CONCLUSION

Mr. Kamensky made serious mistakes during those few hours on July 31, 2020, and, accordingly, he has accepted serious punishment. Based on the judgment of the court in the underlying criminal action, it would not serve the public interest to punish him further. For the foregoing reasons, Mr. Kamensky respectfully requests that the Commission grant summary disposition in his favor and decline to bar him from association with any investment adviser, broker-dealer, or other industry professionals enumerated in Advisers Act Section 203(f). However, to the extent the Commission decides that an additional sanction is necessary, Mr. Kamensky submits that nothing more than a twelve-month suspension would be appropriate.

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of Richard Hong in support of the Division's brief. The exhibited version omits Mr. Kamensky's final answer, in which he explains: "This doesn't excuse or minimize my behavior in any way—it was inexcusable—and I take full responsibility for it." He further notes: "I was taught that if you make a mistake, you take responsibility for it and you do your best to make amends. I have done just that, and will pay my debt to society." *Ex. 15 (Petition Interview).*

Applicant Details

First Name	**Jace**
Middle Initial	**J.**
Last Name	**Lee**
Citizenship Status	**U. S. Citizen**
Email Address	**jacelee@uchicago.edu**
Address	**Address** Street **235 E. 40th St.** City **New York** State/Territory **New York** Zip **10016** Country **United States**
Contact Phone Number	**2673037543**

Applicant Education

BA/BS From	**Swarthmore College**
Date of BA/BS	**June 2017**
JD/LLB From	**The University of Chicago Law School** **https://www.law.uchicago.edu/**
Date of JD/LLB	**June 3, 2023**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**University of Chicago Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Professional Organization

Organizations	**Just the Beginning Organization**

Recommenders

Hafetz, Frederick
fhafetz@hafetzlaw.com
Hallett, Nicole
nhallett@uchicago.edu
773-702-9611
Baird, Douglas
dbaird@uchicago.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

JACE J. LEE
235 E. 40th St., Unit 21I, New York, NY 10016 • (267) 303-7543 • jacelee@uchicago.edu

June 8, 2023

The Honorable Kiyo A. Matsumoto
U.S. District Court for the Eastern District of New York
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, New York 11201-1818

Dear Judge Matsumoto:

I recently graduated, with Honors, from the University of Chicago Law School and am writing to apply for a clerkship in your chambers for the 2025–26 term. By 2025, I will have had 2 years of post-graduate work experience in litigation. I am a resident of NY and intend to practice here long term.

I will bring to your chambers strong skills in legal research and writing. In law school and during summer internships, I received highly favorable feedback on assignments with regard to refinement of legal standards and application of them to novel fact patterns. For example, as a student attorney in the Immigrants' Rights Clinic, I lead-drafted several briefs and received the highest grade in the Clinic. In addition to skills in analyzing and applying the law, I am an organized thinker and writer. At Swarthmore College, I first-authored a full research manuscript methodically synthesizing complex data and was one of few undergraduates to present at a national academic conference. I will use these skills to assist you effectively on various tasks, such as preparing bench memoranda and drafting opinions on dispositive motions.

Beyond abovementioned skills, as an aspiring trial lawyer, I would be honored to learn from someone like you, who has had an extensive and distinguished career as a federal prosecutor. As a criminal defense paralegal for a former Chief of the Criminal Division at the U.S. Attorney's Office (SDNY), I helped prepare for trial a case involving a 45-count federal indictment. I analyzed voluminous discovery productions and prepared detailed fact memos of documents in relation to government charges. Moreover, in law school, I helped successfully defend a refugee from deportation by direct-examining a fact witness in immigration court. I hope to continue to develop a better understanding of trials.

Enclosed please find my resume, writing sample, and transcripts for your review. Letters of recommendation from my former employer Fred Hafetz and Professors Nicole Hallett and Douglas Baird will arrive under separate cover. Thank you for your time and consideration.

Sincerely,

Jace J. Lee

Enclosures

JACE JONGSEOK LEE

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EDUCATION

THE UNIVERSITY OF CHICAGO LAW SCHOOL, Chicago, IL
J.D., *with Honors*, June 2023
Honors: *Law Review* (published member): Pro Bono Honors; Ellen S. & George A. Poole III Scholar
Publication: Jace Lee, *Applying the State-Created-Danger Doctrine to Cases Involving Suicide in Noncustodial Settings beyond Schools*, 5/23/2022 U. Chi. L. Rev. Online 1 (2022)
Activities: Immigrants' Rights Clinic; RA to Professor William Hubbard; Asian Pacific American Law Students Assoc.; First Generation Professionals; OutLaw; Education & Child Advocacy Society

SWARTHMORE COLLEGE, Swarthmore, PA
B.A., Educational Studies and Music, May 2017
Honors: *Phi Beta Kappa* (GPA: 3.93/4.00); Jacob & Rae Mattuck Scholar; Richard Rubin Scholar
Activities: Writing Program, Lead Fellow & Student Researcher; Student Academic Mentoring Program, Peer Mentor; Educational Psychology Lab, Research Assistant; Chamber Ensemble, Pianist

EXPERIENCE

IMMIGRANTS' RIGHTS CLINIC, **MANDEL LEGAL AID CLINIC**, Chicago, IL
Student Attorney, September 2021 – June 2023

- Lead-drafted and filed federal complaint alleging claims arising under FTCA and opposition to MTD
- Lead-drafted and filed briefs to Immigration Court re: Convention Against Torture; to Board of Immigration Appeals re: modified categorical approach involving Kentucky criminal statute and federal definition of crime of violence; to USCIS re: eligibility for asylum and humanitarian parole
- Direct-examined fact witness at immigration trial and successfully defended refugee from deportation

FOLEY HOAG, LLP, New York, NY
Summer Associate, May 2022 – July 2022 *** Offer to return extended and accepted ***

- Prepared memoranda re: excessive force doctrine under § 1983; re: prematurity of summary judgment; re: for cause limitation on credit bidding under 11 U.S.C. § 363(k); re: race-conscious admissions policy

U.S. ATTORNEY'S OFFICE, **EASTERN DISTRICT OF NEW YORK**, New York, NY
Summer Intern, *Civil Division*, June 2021 – August 2021

- Prepared memoranda re: "undue hardship" provision in 11 U.S.C. § 523(a)(8); re: effect of voluntary production of records on justiciability of FOIA action; re: viability of Title VII claim

HAFETZ & NECHELES, LLP, New York, NY
Paralegal, May 2019 – July 2020

- Prepared fact memoranda based on client meetings and teleconferences
- Analyzed voluminous discovery productions for federal criminal investigation
- Drafted cross-examination outlines of key government witnesses

THE NOCK LAB, HARVARD UNIVERSITY, Cambridge, MA
Research Assistant, October 2017 – April 2018

- Assisted research on suicidal behavior through collection and analysis of data

TEACH FOR AMERICA, Boston, MA
High School Teacher, June 2017 – October 2017

- Taught AP Calculus to 25 seniors and improved student performance on practice state exam by 40%

LANGUAGES & INTERESTS

- Fluent in Korean; conversational in Japanese; interested in piano composition and biking

THE UNIVERSITY OF CHICAGO

Name: Jace Jongseok Lee
Student ID: 12276137

University of Chicago Law School

Degrees Awarded

Degree: Doctor of Law
Confer Date: 06/03/2023
Degree GPA: 179.101
Degree Honors: With Honors
J.D. in Law

Academic Program History

Program: Law School
Start Quarter: Autumn 2020
Current Status: Completed Program
J.D. in Law

External Education

Swarthmore College
Swarthmore, Pennsylvania
Bachelor of Arts 2017

Beginning of Law School Record

Autumn 2020

Course		Description	Attempted	Earned	Grade
LAWS	30101	Elements of the Law Richard Mcadams	3	3	176
LAWS	30211	Civil Procedure William Hubbard	4	4	179
LAWS	30611	Torts Daniel Hemel	4	4	179
LAWS	30711	Legal Research and Writing Erin Lynn Miller	1	1	178

Winter 2021

Course		Description	Attempted	Earned	Grade
LAWS	30311	Criminal Law John Rappaport	4	4	179
LAWS	30411	Property Lee Fennell	4	4	177
LAWS	30511	Contracts Bridget Fahey	4	4	178
LAWS	30711	Legal Research and Writing Erin Lynn Miller	1	1	178

Spring 2021

Course		Description	Attempted	Earned	Grade
LAWS	30712	Legal Research, Writing, and Advocacy Erin Lynn Miller	2	2	179
LAWS	30713	Transactional Lawyering Douglas Baird	3	3	177
LAWS	40301	Constitutional Law III: Equal Protection and Substantive Due Process Aziz Huq	3	3	178
LAWS	43201	Comparative Legal Institutions Thomas Ginsburg	3	3	176
LAWS	44201	Legislation and Statutory Interpretation Farah Peterson	3	3	177

Summer 2021

Honors/Awards
The University of Chicago Law Review, Staff Member 2021-22

Autumn 2021

Course		Description	Attempted	Earned	Grade
LAWS	40101	Constitutional Law I: Governmental Structure David A Strauss	3	3	176
LAWS	53264	Advanced Legal Research Todd Ito Scott Vanderlin	3	3	178
LAWS	90211	Immigrants' Rights Clinic Amber Hallett	3	3	182
LAWS	94110	The University of Chicago Law Review Anthony Casey	1	1	P

Winter 2022

Course		Description	Attempted	Earned	Grade
LAWS	53306	Anthropology and Law	3	3	180
Req Designation:		Meets Writing Project Requirement Christopher Fennell			
LAWS	54303	Racism, Law, and Social Sciences Christopher Fennell	3	3	179
LAWS	90211	Immigrants' Rights Clinic Amber Hallett	3	3	182
LAWS	94110	The University of Chicago Law Review Anthony Casey	1	1	P

Date Issued: 06/11/2023

THE UNIVERSITY OF CHICAGO

Name: Jace Jongseok Lee
Student ID: 12276137

University of Chicago Law School

Spring 2022

Course		Description	Attempted	Earned	Grade
LAWS	43200	Immigration Law Amber Hallett	3	3	177
LAWS	43244	Patent Law Jonathan Masur	3	3	179
LAWS	81123	Negotiation Jesse Ruiz	3	3	181
LAWS	90211	Immigrants' Rights Clinic Amber Hallett	3	3	182
LAWS	94110	The University of Chicago Law Review Req Meets Substantial Research Paper Requirement Designation: Anthony Casey	1	1	P

Summer 2022

Honors/Awards
The University of Chicago Law Review, Staff Member 2022-23

Autumn 2022

Course		Description	Attempted	Earned	Grade
LAWS	42201	Secured Transactions Douglas Baird	3	3	180
LAWS	43284	Professional Responsibility and the Legal Profession Anna-Maria Marshall	3	3	182
LAWS	53459	Brief Writing and Appellate Advocacy Brett Legner	3	3	180
LAWS	93499	Independent Research: Federal Tort Claims Act (FTCA) Amber Hallett	2	2	183
LAWS	94110	The University of Chicago Law Review Anthony Casey	0	0	P

Winter 2023

Course		Description	Attempted	Earned	Grade
LAWS	41101	Federal Courts Alison LaCroix	3	3	177
LAWS	46101	Administrative Law David A Strauss	3	3	180
LAWS	52003	Judicial Opinion Writing Robert Hochman Gary Feinerman	3	3	180
LAWS	93499	Independent Research: Federal Tort Claims Act (FTCA) Amber Hallett	1	1	183
LAWS	93499	Independent Research: Dilemmas of Legal Education Anna-Maria Marshall	2	2	183
LAWS	94110	The University of Chicago Law Review Anthony Casey	0	0	P

Spring 2023

Course		Description	Attempted	Earned	Grade
BUSN	42128	Outsourcing in the Modern Economy: Contract Governance and Business Strategy Lisa Bernstein	3	3	P
LAWS	41601	Evidence John Rappaport	3	3	181
LAWS	43208	Advanced Civil Procedure William Hubbard	3	3	177
LAWS	93499	Independent Research: Federal Tort Claims Act (FTCA) Req Meets Substantial Research Paper Requirement Designation: Amber Hallett	1	1	183
LAWS	94110	The University of Chicago Law Review Anthony Casey	0	0	P

Honors/Awards
Pro Bono Honors

End of University of Chicago Law School

OFFICIAL ACADEMIC DOCUMENT

THE UNIVERSITY OF CHICAGO

Key to Transcripts of Academic Records

1. Accreditation: The University of Chicago is accredited by the Higher Learning Commission of the North Central Association of Colleges and Schools. For information regarding accreditation, approval or licensure from individual academic programs, visit http://csl.uchicago.edu/policies/disclosures.

2. Calendar & Status: The University calendar is on the quarter system. Full-time quarterly registration in the College is for three or four units and in the divisions and schools for three units. For exceptions, see 7 Doctoral Residence Status.

3. Course Information: Generally, courses numbered from 10000 to 29999 are courses designed to meet requirements for baccalaureate degrees. Courses with numbers beginning with 30000 and above meet requirements for higher degrees.

4. Credits: The Unit is the measure of credit at the University of Chicago. One full Unit (100) is equivalent to 3 1/3 semester hours or 5 quarter hours. Courses of greater or lesser value (150, 050) carry proportionately more or fewer semester or quarter hours of credit. See 8 for Law School measure of credit.

5. Grading Systems:

Quality Grades

Grade	College & Graduate	Business	Law
A+	4.0	4.33	
A	4.0	4.0	186-180
A-	3.7	3.67	
B+	3.3	3.33	
B	3.0	3.0	179-174
B-	2.7	2.67	
C+	2.3	2.33	
C	2.0	2.0	173-168
C-	1.7	1.67	
D+	1.3	1.33	
D	1	1	167-160
F	0	0	159-155

Non-Quality Grades

I	**Incomplete:** Not yet submitted all evidence for final grade. Where the mark I is changed to a quality grade, the change is reflected by a quality grade following the mark I, (e.g. IA or IB).
IP	**Pass** (non-Law): Mark of I changed to P (Pass). See 8 for Law IP notation.
NGR	**No Grade Reported:** No final grade submitted
P	**Pass:** Sufficient evidence to receive a passing grade. May be the only grade given in some courses.
Q	**Query:** No final grade submitted (College only)
R	**Registered:** Registered to audit the course
S	**Satisfactory**
U	**Unsatisfactory**
UW	**Unofficial Withdrawal**
W	**Withdrawal:** Does not affect GPA calculation
WP	**Withdrawal Passing:** Does not affect GPA calculation
WF	**Withdrawal Failing:** Does not affect GPA calculation
	Blank: If no grade is reported after a course, none was available at the time the transcript was prepared.

Examination Grades

H	Honors Quality
P*	High Pass
P	Pass

Grade Point Average: Cumulative G.P.A. is calculated by dividing total quality points earned by quality hours attempted. For details visit the Office of the University Registrar website: http://registrar.uchicago.edu.

6. Academic Status and Program of Study: The quarterly entries on students' records include academic statuses and programs of study. The Program of Study in which students are enrolled is listed along with the quarter they commenced enrollment at the beginning of the transcript or chronologically by quarter. The definition of academic statuses follows:

7. Doctoral Residence Status: Effective Summer 2016, the academic records of students in programs leading to the degree of Doctor of Philosophy reflect a single doctoral registration status referred to by the year of study (e.g. D01, D02, D03). Students entering a PhD program Summer 2016 or later will be subject to a University-wide 9-year limit on registration. Students who entered a PhD program prior to Summer 2016 will continue to be allowed to register for up to 12 years from matriculation.

Scholastic Residence: the first two years of study beyond the baccalaureate degree. (Revised Summer 2000 to include the first four years of doctoral study. Discontinued Summer 2016)

Research Residence: the third and fourth years of doctoral study beyond the baccalaureate degree. (Discontinued Summer 2000.)

Advanced Residence: the period of registration following completion of Scholastic and Research Residence until the Doctor of Philosophy is awarded. (Revised in Summer 2000 to be limited to 10 years following admission for the School of Social Service Administration doctoral program and 12 years following admission to all other doctoral programs. Discontinued Summer 2016.)

Active File Status: a student in Advanced Residence status who makes no use of University facilities other than the Library may be placed in an Active File with the University. (Discontinued Summer 2000.)

Doctoral Leave of Absence: the period during which a student suspends work toward the Ph.D. and expects to resume work following a maximum of one academic year.

Extended Residence: the period following the conclusion of Advanced Residence. (Discontinued Summer 2013.)

Doctoral students are considered full-time students except when enrolled in Active File or Extended Residence status, or when permitted to complete the Doctoral Residence requirement on a half-time basis.

Students whose doctoral research requires residence away from the University register *Pro Forma*. *Pro Forma* registration does not exempt a student from any other residence requirements but suspends the requirement for the period of the absence. Time enrolled Pro Forma does not extend the maximum year limit on registration.

8. Law School Transcript Key: The credit hour is the measure of credit at the Law School. University courses of 100 Units not taught through the Law School are comparable to 3 credit hours at the Law School, unless otherwise specified.

The frequency of honors in a typical graduating class:

Highest Honors (182+)
0.5%
High Honors (180.5+)(pre-2002 180+)
7.2%
Honors (179+)(pre-2002 178+)
22.7%

Pass/Fail and letter grades are awarded primarily for non-law courses. Non-law grades are not calculated into the law GPA.

P** indicates that a student has successfully completed the course but technical difficulties, not attributable to the student, interfered with the grading process.

IP (In Progress) indicates that a grade was not available at the time the transcript was printed.

* next to a course title indicates fulfillment of one of two substantial writing requirements. (Discontinued for Spring 2011 graduating class.)

See 5 for Law School grading system.

9. FERPA Re-Disclosure Notice: In accordance with U.S.C. 438(6)(4)(8)(The Family Educational Rights and Privacy Act of 1974) you are hereby notified that this information is provided upon the condition that you, your agents or employees, will not permit any other party access to this record without consent of the student.

Office of the University Registrar
University of Chicago
1427 E. 60th Street
Chicago, IL 60637
773.702.7891

For an online version including updates to this information, visit the Office of the University Registrar website:
http://registrar.uchicago.edu.

Revised 09/2016

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OFFICES OF FREDERICK P. HAFETZ *LLC*
ATTORNEYS AT LAW

420 LEXINGTON AVENUE #2818
NEW YORK, N.Y. 10170
TELEPHONE: (212) 997-7400
TELECOPIER. (212) 997-7646

July 22, 2022

Re: Jace Lee Reference

To whom it may concern:

I write on behalf of Jace Lee who worked as a paralegal for my law firm from May 2019 to July 2020. I am a former Federal prosecutor. My law firm specializes in white collar criminal defense practice, and particularly in trial work.

I first describe the nature of the work that paralegals do for my firm. For many years, I have hired top college graduates as paralegals. Their work assignments involve the factual analysis of a case. In many ways, their assignments are like those of an associate in learning and analyzing the facts. I rely heavily on the memoranda that the paralegals prepare on the documents. I also have my paralegals participate in meetings with clients and witnesses and, importantly, in the internal office meetings as we develop case theory. I rely heavily on their work.

Jace is a standout among the many excellent paralegals I have hired over the years, many of whom who have gone on to become law clerks for federal judges. His primary assignment was working on preparation for trial of a 45-count federal indictment charging mail fraud, false statements and tax violations. The case ultimately went to trial after Jace had left my firm for law school. A substantial part of Jace's work was analysis of voluminous documents and preparation of memos about them. The documents included financial records and organizational records for a seven-year time period of a not-for-profit organization that my client headed. These documents were complex, and mastery of them was essential for the defense.

Jace's work on this was outstanding. His memos were some of the most comprehensive and insightful that paralegals have ever done for me. They were always extremely clearly written, concise and logical. And Jace would invariably find new issues that I had not thought of. And always, at our team meetings, Jace's insights were sharp and advanced our thinking on the case. His contribution to the case was invaluable. My greatest regret was that he was not in the court room to help us try the case.

Beyond this, he is a very nice person and easy to work with. His work ethic was admirable. He would often come in on weekends without being asked to do so because he felt that additional work was needed on one of his memos. Often on Mondays he would tell me about new problems that we needed to develop.

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I highly recommend Jace for a clerkship and would be pleased to discuss him with you.

Sincerely,

Frederick P. Hafetz

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THE LAW SCHOOL

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Nicole Hallett
Clinical Professor of Law

June 9, 2023

The Honorable Kiyo A. Matsumoto
United States District Court
Eastern District of New York
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Re: Jace Lee Clerkship Application

Dear Judge Matsumoto:

I am writing this recommendation on behalf of Jace Lee for a clerkship in your chambers. I am a Clinical Professor of Law at the University of Chicago Law School and the Director of the Immigrants' Rights Clinic (IRC). Jace was a student in IRC from September 2021 to June 2022. IRC only enrolls 8-12 students per year and I work closely with each student on multiple projects. I have had over two dozen meetings with Jace, have reviewed at least a dozen drafts of legal documents, and had the opportunity to observe him in the classroom and in court. I can say unequivocally that he was the strongest student I taught last year in IRC and I believe he will make an excellent judicial clerk. You should hire him before someone else does.

Jace joined two teams and then volunteered for a third partway through the academic year. The first was a team representing a refugee from Syria on his application for asylum. The case required extensive fact development and legal research, both of which Jace excelled at. He also was the primary drafter of the legal brief that accompanied the application. Throughout the process, I noticed that Jace can focus on both the big picture and the tiniest of details. He works independently and handles deadlines well. More than that, he is a strategic and creative thinker who can put together complex ideas and arguments in a compelling way. Nothing could get by him. Jace noticed inconsistencies in the client's story that I did not even pick up on. He diligently researched filing requirements without me even asking him to do so. I knew that I could absolutely count on him to handle any job I gave him. I trusted him implicitly because the quality of his work was so consistently high. Jace was on a team with a third-year student who was much weaker than Jace. Jace not only handled his tasks, but often redid tasks that the other student had completed.

Jace's second team represented an individual in removal proceedings and Jace was one of three students who were part of the trial team. Jace was responsible for doing the direct examination and defending the cross examination for two third-party witnesses. Though Jace joined the trial team just a few weeks before trial, he excelled at trial advocacy.

Though these skills may be less important for a judicial clerkship, they will no doubt serve him well in his future legal career, whatever path it takes. Again, as in the asylum case, Jace became proficient at any task given to him, putting in as many hours as possible to master it. It was not a surprise to me that we won the trial and that the judge specifically congratulated Jace on his performance.

If these two cases were not enough, Jace also volunteered halfway through the year for a third project applying for humanitarian parole for Afghans who remained in Afghanistan after the U.S. withdrawal. Jace understood the gravity of this project as well as that of the other projects to which he was assigned. In all three cases, people's lives were at stake. One mistake could lead to a person's death. Though I think this responsibility weighed heavily on Jace, he learned how to cope with it by investing even more time and energy in doing an excellent job. He earned the highest grade in clinic and several points higher than I would typically award. His work was of such high quality that I knew it needed to be reflected in his grade.

I have no concerns whatsoever about recommending Jace for a judicial clerkship. He would be an asset to you in every way—in writing bench memos and opinions, in providing support to chambers and the other law clerks, and in being a sounding board for ideas. Unfortunately, Jace has taken so many credits in my clinic that he cannot enroll again this year. I am actively finding ways to continue to work with him, through other classes or independent studies. There are few students who are as capable, intelligent, and hardworking as Jace. I hope you will consider hiring him to be your law clerk.

If you have any questions about this recommendation or Jace, please do not hesitate to contact me at 203-910-1980 or nhallett@uchicago.edu.

Sincerely,

Nicole Hallett
Clinical Professor of Law
University of Chicago Law School

NH/z

THE UNIVERSITY OF CHICAGO
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Douglas G. Baird
Harry A. Bigelow Distinguished Service Professor of Law

June 11, 2023

The Hon. Kiyo A. Matsumoto
United States District Court for the Eastern District of New York
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I write with great pleasure in support of Jace Lee's application for a clerkship in your chambers.

Mr. Lee has proved himself a most impressive young lawyer during his time at the University of Chicago Law School. He particularly stood out in the secured transactions class he took from me this past fall. He showed a natural aptitude for applying the principles embedded in a dense statutory framework to entirely novel transactions. On the examination, Mr. Lee was particularly impressive in the way he effortlessly dealt with the legal challenges raised by merchant cash advance funding transactions, a form of financing that is new on the scene and hardly touched upon in class. Both in class and especially outside of it, Mr. Lee was the one who asked hard questions that got exactly to the heart of the matter. Whenever he came by the office, it was always certain that his questions would be the hardest, the toughest, and the most interesting.

In manner and temperament, Mr. Lee exudes a quiet charm. He is serious and smart and emphatically a self-starter. The first in his family to attend college, Mr. Lee has forged his own way in the world, arriving on American soil at the age of twelve knowing little about this country, its language, and its customs beyond a rudimentary understanding of the English alphabet. Perhaps because of his fine musical ear, you would never guess that English was not his native language. His mastery of written prose is exemplary by any standard.

With his poise and ability to think on his feet, it is easy to see Mr. Lee as a litigator, and his intellectual gifts and inner drive will open any door for him in the law. There is no doubt but that he will be an outstanding law clerk, and I can recommend him enthusiastically and without reservation.

Sincerely,
Douglas G. Baird

JACE J. LEE
235 E. 40th St., Unit 21I, New York, NY 10016 • (267) 303-7543 • jacelee@uchicago.edu

Writing Sample

The following writing sample is part of a memorandum of law in opposition to the government's motion to dismiss in a currently pending case. Memo. Opp. Mot. to Dismiss, *Caal v. United States*, No. 23-cv-00598 (N.D. Ill. May 16, 2023). For this memorandum, I wrote the Argument section concerning the discretionary function exception under the Federal Tort Claims Act. 28 U.S.C. § 2680(a). The lawsuit asserts injuries arising from former President Trump's Zero Tolerance Policy, which forcibly separated thousands of immigrant families, including minors from their parents, as in this case.

I prepared this memorandum for the Immigrants' Rights Clinic at the University of Chicago Law School. I received minimal line edits from my supervising attorney. I obtained permission from the Clinic to use this memorandum as a writing sample.

INTRODUCTION

Plaintiffs Selvin Argueta Caal ("Selvin Sr.") and Selvin Aldair Argueta Najera ("Selvin Jr.") came to the United States to seek asylum. Instead, the father and son encountered a cruel and punishing federal policy of forced family separation. Now, Plaintiffs bring this lawsuit under the Federal Tort Claims Act ("FTCA") seeking redress for the trauma government officers inflicted on them. 28 U.S.C. §§ 1346(b)(1), 2671–2680. The government's motion to dismiss attempts to portray the zero-tolerance policy as routine enforcement of immigration law. It was not. In fact, the government essentially concedes that the policy and its applications were illegitimate, avowing that "[t]he United States does not defend the policy choices that led to family separations in the previous administration." Def.'s Memo. Supp. Mot. Dismiss 1, ECF No. 11.

Despite this admission, the government attempts to shield itself from accountability under a veil of sovereign immunity. But by enacting the FTCA, Congress waived the government's sovereign immunity for precisely the kind of tortious conduct Plaintiffs allege. In addition, Plaintiffs have sufficiently pled their claims. Accordingly, the Court should deny the motion to dismiss.

ARGUMENT

I. The Discretionary Function Exception Does Not Apply to Plaintiffs' Claims

The government cannot avoid liability by invoking the discretionary function exception ("DFE") of the FTCA. 28 U.S.C. § 2680(a) provides an exception to the FTCA's grant of jurisdiction for claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." There are two steps to the DFE analysis. First, the action being challenged must be discretionary, "involv[ing] an element of judgment or choice." *Berkovitz v. United States*, 486 U.S. 531, 536 (1988). If the government fails

the first step, the inquiry ends and the DFE does not apply. *Id.* Second, even if the challenged action involves an element of judgment or choice, the judgment or choice must be "of the kind that the [DFE] was designed to shield." *Id.* That is, the action must involve "permissible exercise of policy judgment." *United States v. Gaubert*, 499 U.S. 315, 326 (1991) (quoting *Berkovitz*, 486 U.S. at 538 n.3). The government fails both steps. Accordingly, this Court must reject the DFE defense.

A. The Challenged Actions Did Not Involve Any Element of Judgment or Choice

The actions of government officers that Plaintiffs challenge fall into two categories: the nearly two-year-long separation of Plaintiffs and the abuse and mistreatment during Plaintiffs' detention. The government largely ignores the latter category of actions and fails to show how either category of actions involved an element of judgment or choice as required under step one of the DFE. *See* Mot. Dismiss 12–18. The DFE therefore does not apply.

1. The Two-Year-Long Separation of Selvin Jr. From Selvin Sr. Did Not Involve Any Element of Judgment or Choice

Actions of government officials that separated Plaintiffs did not involve judgment or choice for two independent reasons. First, the zero-tolerance policy precluded officers from exercising any judgment or choice when they prosecuted Selvin Sr. for unlawful entry and separated him from his son. The name of the policy itself confirms that "zero" exceptions were permitted. Second, government officers unlawfully deported Selvin Sr., in contravention of the federal asylum law, prolonging Plaintiffs' separation for nearly two years. Government officials do not have discretion to violate federal laws, so these actions did not involve any element of judgment or choice.

(i) The zero-tolerance policy itself precluded any exercise of judgment or choice by individual officers who separated Plaintiffs.

Government actions must involve an element of judgment or choice for the DFE to apply. *Grammatico v. United States*, 109 F.3d 1198, 1200 (7th Cir. 1997) (citing *Gaubert*, 499 U.S. at 322). The inquiry "is not limited to decisions made at the policy or planning level, but rather

extends to decisions at the operational level that are in furtherance of governmental policy." *Palay v. United States*, 349 F.3d 418, 429 (7th Cir. 2003) (citation omitted). "[A] court must first consider whether the action is a matter of choice for the acting employee." *Berkovitz*, 486 U.S. at 536.

The DFE does not shield torts committed by government employees if those employees could exercise no judgment or choice in the implementation of a policy. *See Palay,* 349 F.3d at 429–30. For example, in *Indian Towing*, the Supreme Court rejected the DFE defense for tort claims arising from the failure of Coast Guard maintenance personnel to properly maintain a lighthouse, "because such workers were not charged with deciding what level of maintenance inspections were necessary." *Palay*, 349 F.3d at 430 (citing *Indian Towing Co. v. United States*, 350 U.S. 61, 64, 69 (1955)). Therefore, even if the government's decision to enact a policy might fall within the DFE's scope, the United States is still liable for torts committed by its employees implementing the policy if those employees could not exercise judgment or choice.

That is precisely what occurred here. The zero-tolerance policy prohibited government employees from exercising any judgment or choice when criminally prosecuting Selvin Sr. and subsequently separating him from his then-minor son Selvin Jr. On April 6, 2018, then-Attorney General Sessions "directed each United States Attorney's Office along the Southwest Border . . . to adopt immediately a zero-tolerance policy for all offenses referred for prosecution under [8 U.S.C. §] 1325(a)." Memorandum from the U.S. Dep't of Just., Off. of the Att'y Gen., Memorandum for Federal Prosecutors Along the Southwest Border (Apr. 6, 2018), https://www.justice.gov/opa/press-release/file/1049751/download. The Attorney General clarified that "[t]his zero-tolerance policy shall *supersede any existing policies.*" *Id.* (emphasis added). By implementing the zero-tolerance policy, "then-Attorney General Sessions 'prescribe[d] a course of action for [federal] employee[s] to follow.'" *C.D.A. v. United States,* No. CV 21-469, 2023 WL

2666064, at *14 (E.D. Pa. Mar. 28, 2023). The unqualified mandate of the zero-tolerance policy, deprived government employees who separated migrant families under the policy of any judgment or choice for purposes of the DFE analysis. *Id.*; *P.G. v. United States*, No. 21-cv-4457, 2022 WL 3024319, at *4 (N.D. Cal. May 10, 2022) ("Since the family separation policy was a policy prescribed by the Trump Administration, the front-line employees tasked with implementing the policy did not reasonably have any element of choice.").

The government argues that it enjoys the protection of the DFE because the zero-tolerance policy simply "amounts to exercise of the prosecutorial discretion . . . confer[red] on the Attorney General." Mot. Dismiss 13 (citation omitted). The cases it cites adopt this myopic definition of discretion. *See, e.g.*, *S.E.B.M. v. United States*, 2023 WL 2383784, at *14 (D.N.M. Mar. 6, 2023). However, this argument misses the mark. The first step of the DFE analysis is not limited to whether the government itself has discretion to enact policies. *Palay*, 349 F.3d at 429. Instead, the DFE analysis considers the actions of *individual officers* in charge of implementing a broader policy, who "must be charged with making policy-related judgments in order for [their] choices to qualify for the [DFE]." *Id.* at 430. The zero-tolerance policy eliminated prosecutorial discretion of individual officers. *See Mayorov v. United States*, 84 F.Supp.3d 678, 690–91 (N.D. Ill. 2015) (denying DFE because the government officer lacked the authority to exercise discretion in making detainer determinations and using this fact to "distinguish[] . . . from the mine-run prosecutorial discretion cases"); *C.D.A.*, 2023 WL 2666064, at *14 ("While prosecutors are typically afforded an abundance of choice in their decisions, the Attorney General had explicitly directed the United States Attorney's Offices at the United States–Mexico border to prosecute *all* instances of illegal entry.").

(ii) The extended separation of Plaintiffs resulted from government officers' violations of the federal asylum law.

A government official does not have discretion to violate a federal statute, regulation, or policy. *Palay,* 349 F.3d at 431. Officials violated federal law by denying Selvin Sr. statutorily mandated credible fear procedures and unlawfully deporting him. Compl. ¶¶ 73–76, 79. In *Ms. L*, a class action in which Selvin Sr. was a named plaintiff (referred to as S.A.C.), the court held that Selvin Sr.'s deportation was unlawful because the government violated asylum law. *Ms. L.*, 403 F.Supp.3d at 867–68. Specifically, government officers never informed Selvin Sr. of the disposition of his credible fear interview or provided him a legally-required opportunity to seek review of his credible fear disposition before an immigration judge, as required by law. *Id.* (citing 8 C.F.R. § 208.30(g)(1)). The court found that the government could not refute Selvin Sr.'s allegation that officers coerced him into signing documents in English, a language he does not speak, which might have led to his deportation. *Id.* Selvin Sr. raises similar allegations regarding officers' violations of asylum law. Compl. ¶¶ 64–65, 73–74.

The government must concede the illegality of Selvin Sr.'s deportation because "under the [FTCA] a federal court should apply [the] federal principles of res judicata and collateral estoppel in considering the preclusive effect of a prior federal judgment." *Johnson v. United States*, 576 F.2d 606, 612, 615 (5th Cir. 1978) (holding that the United States could not relitigate a finding of liability from a previous FTCA suit for the same tortious conduct challenged in a new FTCA suit by a different plaintiff); *see also Bowen v. United States*, 570 F.2d 1311, 1320 (7th Cir. 1978) (finding that a plaintiff's previously administratively adjudicated claim collaterally estopped an FTCA suit but noting that "[t]here is no reason that the United States would not likewise have been estopped had the relevant facts been adjudicated in favor of plaintiff in the [previous] proceeding"). While Plaintiffs' initial separation resulted from the government prosecuting Selvin Sr., as

mandated by the zero-tolerance policy, the government's violation of federal asylum law, as held in *Ms. L.*, caused Plaintiffs' prolonged separation. As a result, the government is barred from claiming an exemption under the DFE.

The government argues that it had discretion to separate Plaintiffs because it had discretion to criminally prosecute Selvin Sr., which led to his son being detained separately. *See* Mot. Dismiss 12.[1] Even if that were true, any discretion to separate Plaintiffs ceased the moment Selvin Sr.'s criminal case ended and he was returned to immigration detention. Instead, the government continued to detain Plaintiffs in detention facilities hundreds of miles apart from each other until the government unlawfully deported Selvin Sr. in violation of federal asylum law. Compl. ¶¶ 72, 76. Plaintiffs suffered irreparable injuries arising from their protracted separation. Selvin Jr.'s young age compounded these injuries. *See* Compl. ¶¶ 81–85, 87.

2. Officers' Mistreatment of Plaintiffs in Detention Following the Separation Did Not Involve Any Element of Judgment or Choice

The officers' various forms of mistreatment of Plaintiffs while they were separated and detained did not involve those officers' exercise of judgment or choice for two reasons. First, the alleged mistreatments violated federal law governing conditions of confinement and official conduct. Second, the mistreatments and abuse emanate from officials' separation of Plaintiffs, which the officers had no discretion but to execute under the zero-tolerance policy.

(i) Officers' mistreatment of Plaintiffs violated federal law.

Government officials do not have discretion to plainly violate governing statutes, regulations, and policies. *Berkovitz*, 486 U.S. at 544; *Palay,* 349 F.3d at 431. Officials'

[1] The government also cites cases showing that the government has discretion to decide where to detain noncitizens during removal proceedings. Mot. Dismiss 14–15. But Selvin Sr. and Selvin Jr. were not merely detained in separate facilities. Selvin Sr. was deported from the country, in direct violation of federal asylum law, which precipitated a separation lasting over two years.

mistreatment of Plaintiffs in contravention of laws, regulations and policies in detention therefore involved no judgment or choice. CBP's National Standards on Transport, Escort, Detention, and Search (TEDS) mandate official standards and conditions of confinement in ICE detention facilities. U.S. Customs and Border Protection, *National Standards on Transport, Escort, Detention, and Search* (2015) [hereinafter TEDS]. The *Flores* Agreement, a binding settlement on the United States between federal immigration agencies and minors in immigration custody, similarly imposes minimum standards regarding the detention of children. Settlement Agreement, *Flores v. Reno*, No. CV 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997) [hereinafter *Flores* Agreement]. Government officials subjected Plaintiffs to abuse, protracted separation and inhumane conditions of confinement, violating the abovementioned mandated policies and standards. Therefore, this mistreatment is not shielded by the DFE.

First, the government subjected Plaintiffs to freezing temperatures, violating TEDS § 4.6 and the *Flores* Agreement. *See D.A. v. United States*, EP-22-CV-00295-FM, 2023 WL 2619167, at *12 (W.D. Tex. Mar. 23, 2023) (clarifying that TEDS § 4.6 sets a "minimum standard below which temperatures may not fall: the comfort of detainees"); *Flores* Agreement ¶ 12(A) (requiring detention facilities provide "adequate temperature control"); Compl. ¶¶ 6, 8, 31, 42, 59. TEDS §§ 4.7, 4.12, and 5.6 require detainees "be provided with clean bedding and prohibit officers from using temperature controls in a punitive manner." *A.E.S.E. v. United States*, No. 21-CV-0569 RB-GBW, 2022 WL 4289930, at *10 (D.N.M. Sept. 16, 2022) (internal quotation marks omitted). The conditions of Plaintiffs' confinement clearly violated the TEDS standards and the *Flores* Agreement. Compl. ¶¶ 31, 59.

Second, the government denied Plaintiffs sufficient and sanitary drinking water and food. *See* Compl. 6, 8, 35, 61–62. TEDS §§ 4.13, 4.14, and 5.6 "require [detention] facilities to always

have clean drinking water . . . regularly scheduled mealtimes, with at least two meals served hot to juvenile detainees." *A.E.S.E.,* 2022 WL 4289930, at *10. The *Flores* Agreement also requires that "[f]acilities [that house minors] [] provide . . . drinking water." *See A.E.S.E.,* 2022 WL 4289930, at *10. Officers violated this standard when they deprived Selvin Jr. of adequate, sanitary water and forced him to compete with 70 other children for a gallon of water. Compl. ¶¶ 35, 40.

Third, the government denied Plaintiffs of basic hygiene. Compl. ¶¶ 33, 41, 60, 68. Governing standards provide that "facilities must be regularly and professionally cleaned and sanitized and that detainees must be provided with basic personal hygiene items." *A.E.S.E.,* 2022 WL 4289930, at *10 (citing TEDS Standards §§ 4.6, 4.7, 4.11, and 5.6) (internal quotation marks omitted); *see also Flores* Agreement 12(A).

Fourth, the government denied contact between Selvin Sr. and his minor son, Selvin Jr. Compl. ¶¶ 38, 63, 67, 72. The *Flores* Agreement "require[s] that [INS] successor organizations house unaccompanied minors in facilities that provide 'contact with family members who were arrested with' them." *D.A.,* 2023 WL 2619167, at *7 (citing *Flores* Agreement ¶ 12). In *D.A.*, the court held that the *Flores* Agreement removed the government's discretion to prohibit contact between children and parents. *Id.*

Fifth, the government failed to act in accordance with mandated standards of integrity and professionalism. TEDS §§ 1.2, 1.4 and 5.1 "require that CBP employees must speak and act with the utmost integrity and professionalism" and "treat all individuals with dignity and respect and in a non-discriminatory manner." *A.E.S.E.,* 2022 WL 4289930, at *12 (internal quotation marks omitted). Here, government officials failed standards of professionalism by subjecting Selvin Jr. to physical assault, sleep deprivation, and verbal abuse. Compl. ¶¶ 28, 30, 32, 37, 43–44.

Because TEDS and *Flores* Agreement gave officials no opportunity to exercise discretion in the provision and denial of Plaintiffs' basic needs, the DFE fails at the first step. The Court need not examine these decisions under the second prong.

(ii) The claims arising from the mistreatments all stem from the nondiscretionary separation of Plaintiffs.

Even if the Court finds that the abuse and mistreatment involved an element of judgment or choice, the DFE still does not shield the government because the mistreatment emanated from the separation, which government employees had no discretion but to enforce under the zero-tolerance policy. Several district courts have held that, where government officers lacked discretion regarding the separation of migrant families as prescribed by the zero-tolerance policy, the DFE also did not bar claims arising from the government officers' subsequent mistreatment of separated families. *C.D.A.*, 2023 WL 2666064, at *14 (internal citation omitted) (holding that the DFE did not apply to acts of separation and mistreatment which "ultimately emanated from the . . . zero-tolerance policy" that "prescribed" a course of action officers had to follow); *A.P.F. v. United States*, 492 F. Supp. 3d 989, 996 (D. Ariz. 2020) (holding that the separation of plaintiffs was not discretionary and then that "[b]ecause each of [p]laintiffs' causes of action stem from this separation, none are barred by the [DFE]"). In *A.P.F.*, the court explained that the alleged mistreatment of plaintiffs such as those relating to "conditions of confinement," and "treatment of [p]laintiff [c]hildren during and after the separations" were all aimed at "demonstrating the harm resulting from the separations." *A.P.F.*, 492 F. Supp. at 996–97. Here, too, the Court should deny

the DFE because Plaintiffs' claims arising from the government officers' mistreatment all stem from the separation, which government officials had no choice but to carry out.

B. Even if the Court Finds that the Challenged Actions Involved an Element of Judgment or Choice, the Challenged Actions Are Not of the Kind Shielded by the DFE

Even if officers engaged in some judgment or choice, the government nonetheless cannot demonstrate officials' conduct was a permissible exercise of policy judgment. First, government officials' actions that by default cause injuries cannot be the result of permissible policy analysis. Second, the conduct was unconstitutional and therefore cannot be a permissible exercise of policy judgment. Finally, officers' mistreatment of Plaintiffs in detention was not the result of a policy judgment at all.

1. Even if officers rendered policy decisions, those decisions were impermissible.

Neither the Supreme Court nor the Seventh Circuit has clearly defined the dividing line between "permissible" and "impermissible" policy judgment. Still, courts have repeatedly held that the DFE does not shield government officers' injury-causing actions that have no proper basis in legitimate policy considerations. *See Palay*, 349 F.3d at 432 (noting that the DFE would not apply to claims arising from the corrections officer's negligent or careless monitoring of a prison unit); *Keller v. United States*, 771 F.3d 1021, 1025 (7th Cir. 2014) (refusing to apply DFE where record permitted inference that government actions were based on laziness or inattentiveness rather than "grounded in public policy considerations"); *Ruiz v. United States*, 13-CV-1241 KAM SMG, 2014 WL 4662241, at *8 (E.D.N.Y. Sept. 18, 2014) (holding that CBP officers inadequately feeding a four-year-old child and causing undue delay in contacting her parents as a result of negligence or laziness does not "constitute a considered judgment grounded in social, economic, or political policies").

Here, it was inevitable that suddenly and forcibly separating a parent and minor child would cause considerable trauma. Indeed, "the ['Zero Tolerance'] policy demanded agents to inflict emotional distress . . . that, by default, generate[d] tortious injuries." Brendan Joseph Pratt, Comment, *Cages and Compensatory Damages: Suing the Federal Government for Intentional Infliction of Emotional Distress*, 68 UCLA L. Rev. 288, 320–21 (2021). The policy was met with almost universal condemnation when it became known to the public. Compl. ¶ 87. Members of Congress decried the family separation policy as "inhuman and un-American."[2] Even the government is unwilling to stand behind the policy and its effects. Mot. Dismiss 1. In light of such widespread disavowal of the acts of family separation, surely that conduct cannot be of the sort the DFE is intended to shield. Under the zero-tolerance policy, separation was not a "necessary incident of detention," but was instead the "result of an *unnecessary* governmental action . . . separat[ing] family units who were arrested *together*." *Ms. L. v. U.S. Immigr. & Customs Enf't*, 302 F. Supp. 3d 1149, 1162–63 (S.D. Cal. 2018). An unnecessary action, widely decried, and resulting in objectively foreseeable injuries cannot constitute a permissible policy judgment.

2. Government Officials Acted Unconstitutionally

The government also fails the second step of the DFE because the officers' actions were unconstitutional and therefore cannot be the result of permissible policy judgment that the DFE shields. *See Gaubert*, 499 U.S. at 322–23. It is not permissible for government officers to violate the constitution in making their policy judgements.

The majority of circuits have held, or expressed in dicta, that government officers do not have "discretion" to violate the Constitution just as officers do not have "discretion" to violate

[2] *Oversight of Family Separation and U.S. Customs and Border Protection Short-Term Custody Under the Trump Administration*, 116th Cong. 116–42, at 63 (2019) (Rep. Nadler, Chairman, H. Comm. on the Judiciary); *see id.* at 2–3 ("No administration has resorted to the cruelty of systematically separating kids from their parents as a method of deterrence.").

federal statutes, regulations, or policy.[3] While the Seventh Circuit has rejected this argument in the context of the first step of the DFE,[4] it has not considered whether the unconstitutionality of officers' actions may be relevant under the second step. In *Linder v. United States*, the Seventh Circuit rejected the plaintiff's constitutional arguments to defeat the DFE defense but limited its analysis to the first step. *See* 937 F.3d 1087, 1090–91 (7th Cir. 2019). Namely, the plaintiff in *Linder* argued that the government failed the first step because its officers did not have discretion to engage in certain actions which were "proscribed" by the Fifth and Sixth Amendments. Brief for Appellant at 6–7, *Linder*, 937 F.3d 1087 (No. 15-1501), 2018 WL 6738732. The plaintiff did not raise an alternative constitutional argument under the second step. *Id.* The Seventh Circuit's holding would thus be limited to the arguments raised before it. *See Hormel v. Helvering*, 312 U.S. 552, 556 (1941) ("Ordinarily an appellate court does not give consideration to issues not raised below.").

Moreover, the *Linder* opinion itself suggests that constitutional arguments are only barred under the first step. *Linder*, 937 F.3d at 1090–91. The opinion notes that constitutional violations are irrelevant to determining whether the challenged actions involved "discretion," an inquiry only under the first step. *Id.* at 1090. The opinion's reference to the "abuse of discretion" proviso in the DFE's text reinforces this narrower reading because this proviso concerns merely whether the

[3] *Fazaga v. Fed. Bureau of Investigation*, 965 F.3d 1015, 1065 (9th Cir. 2020) ("[T]he Constitution can limit the discretion of federal officials such that the FTCA's [DFE] will not apply.") (citation omitted); *Martinez v. United States*, 822 F. App'x 671, 676 (10th Cir. 2020) ("Most circuits also have held conduct is not discretionary when it 'exceeds constitutional bounds.'"); *Loumiet v. United States*, 828 F.3d 935, 943 (D.C. Cir. 2016) (holding the DFE does not provide immunity from unconstitutional conduct); *Limone v. United States*, 579 F.3d 79, 102 (1st Cir. 2009) (same); *Raz v. United States*, 343 F.3d 945, 948 (8th Cir. 2003) (same); *Medina v. United States*, 259 F.3d 220, 225 (4th Cir. 2001) ("federal officials do not possess discretion to violate constitutional rights"); *U.S. Fid. & Guar. Co. v. United States*, 837 F.2d 116, 120 (3d Cir. 1988) (same); *Sutton v. United States*, 819 F.2d 1289, 1293 (5th Cir. 1987) (same); *Myers & Myers Inc. v. USPS*, 527 F.2d 1252, 1261 (2d Cir. 1975) (same).

[4] Plaintiffs do not waive their argument that unconstitutional acts by government officers, as challenged here, also fail the first step of the DFE analysis, in light of the majority of circuits barring discretion to violate the Constitution in the FTCA context.

officer's action involves "discretion," *see* 28 U.S.C. § 2680(a), and does not incorporate the second step relating to officers' policy analysis, a prudential prong created by the Supreme Court based on legislative history. *See Berkovitz*, 486 U.S. at 536–37; *see also United States v. Varig Airlines*, 467 U.S. 797, 814 (1984). This Court should allow Plaintiffs to prevail on the second-step inquiry on constitutional grounds.

The officers' actions were unconstitutional on two separate grounds. First, the officers' actions violated Plaintiffs' constitutional right to family integrity under the Fifth Amendment. A constitutional right to family integrity is an interest long recognized by the Supreme Court. *See, e.g., Troxel v. Granville*, 530 U.S. 57, 65–66 (2000) (plurality opinion) ("[T]he interest of parents in the care, custody, and control of their children [] is perhaps the oldest of the fundamental liberty interests recognized by this Court.") (collecting cases). While the government may have an interest in protecting the welfare of children, the interest of a parent in his child "undeniably warrants deference and, absent a powerful countervailing interest, protection." *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

Numerous courts, including this Court, have upheld the fundamental right to family integrity in the context of family separations pursuant to the zero-tolerance policy. *See, e.g., W.S.R. v. Sessions*, 318 F. Supp. 3d 1116, 1125–26 (N.D. Ill. 2018) (granting partial preliminary injunctive relief and finding children had a "right to reunify with [their] parent in immigration custody, after the parent's criminal detention end[ed] and absent parental unfitness or danger to the child"); *D.A.*, 2023 WL 2619167, at *9; *D.J.C.V. v. United States*, 605 F. Supp. 3d 571, 594–95 (S.D.N.Y. 2022); *J.S.R. ex rel. J.S.G. v. Sessions*, 330 F. Supp. 3d 731, 741–42 (D. Conn. 2018); *M.G.U. v. Nielsen*, 325 F. Supp. 3d 111, 118–21 (D.D.C. 2018); *Jacinto-Castanon v. U.S. Immigr. & Customs Enf't*, 319 F. Supp. 3d 491, 499–500 (D.D.C. 2018); *Ms. L. v. U.S. Imm. & Customs*

Enf't, 310 F. Supp. 3d 1133, 1142–44 (S.D. Cal. 2018). Here, too, the officers separated Plaintiffs and kept them apart until unlawfully deporting Selvin Sr. Compl. ¶¶ 23–26, 28, 38, 45, 47–48, 58 63, 76. The separation was forcible and non-consensual, and traumatized both the son and father. *Id.* The government's actions endangered Selvin Jr.'s welfare and "evince[ed] the conscience-shocking nature of . . . forced family separation[]" that violated Plaintiffs' right to family integrity. *D.A.*, 2023 WL 2619167, at *9; *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 847 (1998).

Second, the officers violated Plaintiffs' procedural due process rights by separating them without any meaningful opportunity to be heard and coercing Selvin Sr. into foregoing his right to asylum. Compl. at ¶¶ 64–66, 73–74, 76; *D.A.*, 2023 WL 2619167, at *9 (denying DFE where officers separated families without any "meaningful opportunity to be heard"); *D.J.C.V.*, 605 F. Supp. 3d at 592, 595 (same); *B.A.D.J. v. United States*, No. CV-21-00215-PHX-SMB, 2022 WL 11631016, at *3 (D. Ariz. Sept. 30, 2022) (same); *see also Brokaw v. Mercer City*, 235 F.3d 1000, 1020 (7th Cir. 2000) (holding that a minor's removal from parents based on government officials' knowing misrepresentation of facts violated his due process rights).

3. Officers' Mistreatment and Abuse of Plaintiffs in Custody was Not the Result of a Policy Choice

The DFE's second step "protects only governmental actions and decisions based on considerations of public policy." *Gaubert*, 499 U.S. at 323 (quoting *Berkovitz*, 486 U.S. at 537). The abuse of Plaintiffs was not the result of a policy choice. There is simply no public policy that could authorize abuse of noncitizens in immigration detention. Officers kicked Selvin Jr. and verbally assaulted both Plaintiffs. They delayed Selvin Jr.'s reunification with his father and denied contact between Plaintiffs. Officers tolerated unsafe conditions such as allowing young boys to fight as guards watched, provided insufficient water and food, deprived Plaintiffs of appropriate hygiene supplies, and maintained "freezing" temperatures without providing blankets. *See*

A.E.S.E., 2022 WL 4289930, at *8. The government offers no public policy rationale authorizing physical and verbal abuse of Plaintiffs because there is none. Mot. Dismiss 12–19.

Applicant Details

First Name	**Miles**
Middle Initial	**B**
Last Name	**Malley**
Citizenship Status	**U. S. Citizen**
Email Address	**milesmalley@gmail.com**
Address	**Address** Street **4217 Lenore Lane 20008 NW** City **Washington D.C.** State/Territory **District of Columbia** Zip **20008** Country **United States**
Contact Phone Number	**12022709885**

Applicant Education

BA/BS From	**University of Southern California**
Date of BA/BS	**May 2018**
JD/LLB From	**Georgetown University Law Center** **https://www.nalplawschools.org/employer_profile?FormID=961**
Date of JD/LLB	**May 22, 2023**
Class Rank	**School does not rank**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Recommenders

Hopwood, Shon
srh90@georgetown.edu
Gunja, Mushtaq
mg1711@georgetown.edu
Corkran, Kelsi
kbc74@georgetown.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Judge Matsumoto,

I am writing to apply for a 2025-2026 clerkship with your chambers. I am currently a 3L at the Georgetown University Law Center. After graduation, I will start as an associate at Fried Frank's office in Washington D.C., working in both the Litigation and Antitrust Departments.

I have wanted to pursue a clerkship since my 1L summer internship for Judge James E. Boasberg of the District Court for the District of Columbia. I thoroughly enjoyed seeing what I learned in my doctrinal classes come to life. I loved participating in the in-depth conversations between the clerks and the Judge in chambers. Most of all, however, I am appreciative of the invaluable lessons the experience taught me in legal research and writing.

This fall, I had the privilege of being one of the seven student interns at the Institute for Constitutional Law and Advocacy (ICAP), where I was able to continue honing my research and analytical skills while assisting with various Supreme Court and appellate matters.

I believe I can offer your office a strong work ethic, proven experiences with legal research and writing, and enthusiastic engagement on the issues. Further, most of my extended family currently lives in New York and it is my hope to eventually practice in the area. A clerkship with your chambers would be an honor and an important first step in this pursuit.

I am enclosing my resume, transcript, and writing sample. Georgetown will submit my recommendations from Professors Shon Hopwood (Criminal Procedure), Musthaq Gunja (Evidence), and Kelsi Corkran and Mary McCord (ICAP) under separate cover. Additionally, Judge Boasberg (james_boasberg@dcd.uscourts.gov) and Charles Abbott of the District of Columbia Office of Human Rights (charles.abbott@dc.gov) have agreed to be references.

I would welcome the opportunity to interview with you and look forward to hearing from you soon.

Best,

Miles Malley
Candidate for Juris Doctorate 2023

MILES MALLEY
2514 Ontario Rd NW, Washington, DC • (202) 270-9885 • mbm270@georgetown.edu

EDUCATION

Georgetown University Law Center — **Washington, DC**
Juris Doctor — May 2023
GPA: 3.73/4.00
Honors: Dean's List (2020-2021); Best Exam (Evidence, Fall 2021)
Activities: Executive Editor, Georgetown Journal of International Law; Research Assistant, Professor Shon Hopwood; Journal Write-On Judge; Tutor, Civil Procedure

University of Southern California — **Los Angeles, CA**
Bachelor of Arts in International Relations and Political Science — May 2018
Honors: Dean's List (Fall 2015, Fall 2016, Spring 2017, Fall 2017, Spring 2018)

EXPERIENCE

Institute for Constitutional Law and Advocacy (ICAP) — **Washington, DC**
Student Intern — September 2022 - December 2022

- Researched class representative substitution and post-certification factual development issues for a Ninth Circuit case
- Wrote memoranda on Supreme Court approach to intra-circuit splits
- Cite-checked Supreme Court amicus brief
- Maintained running dossiers with up-to-date information on potential defendants in public nuisance case

Fried, Frank, Harris, Shriver & Jacobson — **Washington, DC**
Summer Law Clerk - Litigation and Antitrust — May 2022 - August 2022

- Drafted Response to a Motion to Dismiss, Motion to Lift Stay, and Request for Production in patent litigation case
- Wrote several memoranda with regards to antitrust matter
- Drafted brief in affirmative asylum case

D.C. Office of Human Rights — **Washington, DC**
Office of the General Counsel Law Clerk — January 2021 - May 2021

- Drafted interrogatories and requests for production for variety of respondents
- Developed case theory for Interim Director on novel claim under D.C. discrimination laws
- Drafted Voluntary Compliance Agreements and responses to Motions to Dismiss and Requests to Reopen

The Honorable James E. Boasberg (D.C. D.C.) — **Washington, DC**
Legal Intern — May 2021 - August 2021

- Drafted judicial opinions on variety of issues, including: FOIA, Bill of Particulars, and Sovereign Immunity
- Wrote several bench memoranda with proposed disposition in preparation for motion hearings
- Cite-checked opinions

Teach for America — **New Orleans, LA**
Founding 5th Grade Math and Science Teacher — August 2019 - May 2020
Lead Third Grade English and Math Teacher — August 2018 - May 2019

- Developed and implemented math curriculum for Laureate Academy Charter School's first fifth-grade class which resulted in students outperforming district and state in rate of learning and mastery of subjects in end-of-year standardized tests
- Trained new Teach for America elementary-school teachers in greater New Orleans area

LANGUAGE SKILLS, CERTIFICATIONS, AND MISCELLANEOUS

- English (Native), French (Native)
- Certification in Elementary Education (Relay Graduate School of Education)
- LSAT Score: 174

Record of: Miles B. Malley
GUID: 800239000

Course Level: Juris Doctor

Entering Program:
Georgetown University Law Center
Juris Doctor
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2020							
LAWJ	001	21	Civil Procedure Kevin Arlyck	4.00	A	16.00	
LAWJ	002	21	Contracts Girardeau Spann	4.00	B	12.00	
LAWJ	005	20	Legal Practice: Writing and Analysis Erin Carroll	2.00	IP	0.00	
LAWJ	008	22	Torts Mary DeRosa	4.00	A-	14.68	

	EHrs	QHrs	QPts	GPA
Current	12.00	12.00	42.68	3.56
Cumulative	12.00	12.00	42.68	3.56

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2021							
LAWJ	003	22	Criminal Justice Shon Hopwood	4.00	A	16.00	
LAWJ	004	22	Constitutional Law I: The Federal System Paul Smith	3.00	A	12.00	
LAWJ	005	20	Legal Practice: Writing and Analysis Erin Carroll	4.00	B+	13.32	
LAWJ	007	92	Property Neel Sukhatme	4.00	A	16.00	
LAWJ	304	51	Legislation Caroline Fredrickson	3.00	A-	11.01	
LAWJ	611	07	Legal Innovation: Designing Human-Centered Solutions to Challenges in Law Jacklynn Pham	1.00	P	0.00	

Dean's List 2020-2021

	EHrs	QHrs	QPts	GPA
Current	19.00	18.00	68.33	3.80
Annual	31.00	30.00	111.01	3.70
Cumulative	31.00	30.00	111.01	3.70

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2021							
LAWJ	025	05	Administrative Law William Buzbee	3.00	B+	9.99	
LAWJ	165	09	Evidence Mushtaq Gunja	4.00	A	16.00	
LAWJ	215	09	Constitutional Law II: Individual Rights and Liberties Randy Barnett	4.00	A	16.00	
LAWJ	672	08	War Crimes, Terrorism and International Criminal Procedure Michel Paradis	2.00	A	8.00	

	EHrs	QHrs	QPts	GPA
Current	13.00	13.00	49.99	3.85
Cumulative	44.00	43.00	161.00	3.74

----------Continued on Next Column----------

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2022							
LAWJ	121	09	Corporations Michael Diamond	4.00	A-	14.68	
LAWJ	126	05	Criminal Law Alicia Washington	3.00	B+	9.99	
LAWJ	1491	14	Externship I Seminar (J.D. Externship Program) Christina Smith		NG		
LAWJ	1491	92	~Seminar Christina Smith	1.00	B+	3.33	
LAWJ	1491	94	~Fieldwork 3cr Christina Smith	3.00	P	0.00	
LAWJ	361	03	Professional Responsibility Michael Rosenthal	2.00	A-	7.34	

	EHrs	QHrs	QPts	GPA
Current	13.00	10.00	35.34	3.53
Annual	26.00	23.00	85.33	3.71
Cumulative	57.00	53.00	196.34	3.70

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2022							
LAWJ	038	07	Antitrust Law Jonathan Pitt	3.00	A-	11.01	
LAWJ	1601	01	Constitutional Impact Litigation Practicum (Project-Based Practicum) Mary McCord	5.00	A-	18.35	
LAWJ	178	07	Federal Courts and the Federal System Michael Raab	3.00	P	0.00	
LAWJ	317	01	Negotiations Seminar Robert Bordone	3.00	A	12.00	

	EHrs	QHrs	QPts	GPA
Current	14.00	11.00	41.36	3.76
Cumulative	71.00	64.00	237.70	3.71

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2023							
LAWJ	110	97	Copyright Law	3.00	A	12.00	
LAWJ	1396	97	Antitrust Law Seminar: Case Development and Litigation Strategy	3.00	A-	11.01	
LAWJ	1538	05	Constitutional Law: The First and Second Amendments Thomas Hardiman	1.00	P	0.00	
LAWJ	396	05	Securities Regulation	4.00	P	0.00	
LAWJ	885	09	Advocacy in International Arbitration	2.00	A	8.00	
LAWJ	967	08	National Security Law and the Private Sector	1.00	A-	3.67	

Transcript Totals

	EHrs	QHrs	QPts	GPA
Current	14.00	9.00	34.68	3.85
Annual	28.00	20.00	76.04	3.80
Cumulative	85.00	73.00	272.38	3.73

End of Juris Doctor Record

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

April 26, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am writing this letter with enthusiastic support for Miles Malley, who is applying for a clerkship in your chambers. Miles comes to you with proficiency in editing legal writing as my research assistance; and with experience in litigation, after having interned for U.S. District Court James E. Boasberg. But even beyond his legal abilities, Miles would make a wonderful clerk because of his maturity, attention to detail, and pleasant nature. Miles is the complete package, and he has my highest recommendation.

Miles was in my first-year Criminal Procedure class, and it was quickly apparent that his abilities set him apart from the other students in the class. While many students struggled with my reading assignments, Miles arrived prepared and always had comments that went deep below the surface of the cases we were studying. My Crim Pro exam that year was incredibly difficult, and yet Miles rose to the challenge.

I was so impressed with Miles analytical abilities on my exam and his thoughtful participation in class, that I then hired him as my research assistant. In that role, Miles has again shined. He is diligent and always sticks to the deadlines I impose. Miles is also someone who you want around chambers. He has been professional every time I have witnessed him working together with other students. As a result, I have hired him for a second year as my research assistant.

If you need any additional information, please do not hesitate to contact me.

Sincerely,

Shon Hopwood

Shon Hopwood - srh90@georgetown.edu

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

April 26, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am extremely pleased to write this letter of recommendation for Miles Malley, a 2L at the Georgetown University Law Center. I have known Miles for about six months, primarily as a student in my Evidence class. As his Evidence professor, I was able to observe Miles's analytical skills, observed his contributions to classroom discussions, and evaluated his writing. Based on my observations, I think Miles will make an excellent clerk.

Before I tell you a little bit about Miles, I should tell you a bit about the course in which he was enrolled. I teach Evidence a little differently than most professors. Instead of a traditional lecture class, my class is mostly problem based. I break the class up into small discussion groups several times a period, which gives me an opportunity to observe students' interactions and to help if students are struggling with a topic. In addition, I spend quite a bit of time using the Socratic method to tease out students' understanding of the material. This was the first class in-person after the pandemic and it was very helpful for me and the students to be able to have some of those small group discussions face to face and to be able to help students quickly who might have follow-up questions.

Miles was a superb contributor to the class. His enthusiasm for the material was clear and he dove into the assorted class problems with zeal. Over and over, Miles was able to dive a little deeper into the doctrine than the rest of his classmates and was able to uncover some of the underlying policy reasons for the Rules of evidence. His arguments demonstrated a sophistication that was advanced for the course.

Miles's exam performance was also stellar. In a class of 120 students, Miles's exam was one of the two best and he received the distinction of Best Exam in the class. I re-read his exam before writing this letter, and I was struck by the clarity of his writing and how quickly he was able to make his points. Not only did Miles excel in the issue-spotting portion of the exam, but he also was near-perfect on the part that had the students analyze policy prescriptions. It was an excellent exam overall, and I think it demonstrated that Miles is ready to write as a lawyer.

I was also able to spend a bit of time with Miles speaking about his career aspirations. Before coming to law school, Miles spent some time as a teacher in the Teach for America program. That background has inspired him to help solve some of the underlying inequities in our society. Miles is interested in a career in litigation and his facility with the Rules of Evidence seem to me to make him a future natural trial litigator. I think a clerkship will be particularly helpful to him in his career progression.

In short, I recommend Miles highly and without reservation. I am confident that his intelligence, his excellent writing skills, and his interest in trial work will make him a very good clerk. Please feel free to contact me if I can provide any additional information.

Sincerely,

/s/
Mushtaq Gunja
Adjunct Professor
Senior Vice President, American Council on Education
617-899-1862

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

April 26, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

We write to express our enthusiastic support for Miles Malley's application to serve as a law clerk in your chambers, based on Miles's performance in the Constitutional Impact Litigation Practicum-Seminar that we co-taught in the Fall of 2022. Miles's strong research and writing skills, solid work ethic, and collegiality would hold him in good stead in any judge's chambers.

The Practicum-Seminar is a 5-credit course that involves law students in the work of the Institute for Constitutional Advocacy and Protection (ICAP) at Georgetown Law. ICAP is a public interest law practice within the law school that pursues constitutional impact litigation in courts across the country. Over the course of the semester, Miles proved to be a valuable member of our team, providing key legal research and writing in support of numerous litigation matters. His work included researching state law for an amicus brief ICAP filed in the Supreme Court on behalf of Jewish community organizations, explaining why an Arkansas law prohibiting the practice of consumer boycotts of Israel by state contractors is inconsistent with the First Amendment; developing an amicus strategy for a Supreme Court matter involving Title IX sex discrimination; and, most significantly, drafting several substantive memoranda on the class action certification standards as relevant to a rehearing opposition brief we filed in the Ninth Circuit on behalf of a class of homeless individuals who successfully challenged a local ordinance that made it unlawful to rest in any public space within city limits. At the trial court level, Miles conducted important factual research in support of our lawsuit seeking to enjoin a private militia group from engaging in unlawful paramilitary and law enforcement activity.

In addition to his valuable work product, Miles showed his desire to learn as much as he could from his practicum experience. He was admirably proactive in seeking feedback on his work, even after the semester had ended, and he consistently provided thoughtful contributions to our weekly seminar. The seminar covers topics such as threshold barriers to constitutional litigation (standing, abstention, etc.), legal theories under different constitutional provisions (due process, equal protection, First Amendment, etc.), and strategic considerations in impact litigation, among other things. Miles was consistently well prepared and his contributions in these weekly discussions revealed his deep engagement with the material.

Together, we have clerked at all three levels of the federal judiciary and, based on that experience, we believe that Miles would be a welcome addition to any judge's chambers. He is hard-working, pleasant, and eager to both learn from and contribute to the judicial decision-making process. We anticipate an impressive legal career ahead for Miles.

We would be delighted to answer any further questions that you might have. Thank you for considering Miles's application.

Respectfully submitted,

Mary B. McCord, Executive Director & Visiting Professor of Law
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The FTC's Authority to Ban Noncompete Agreements

Miles Malley

Antitrust Law: Case Development and Litigation Strategy

(This paper has not been edited by an outside party)

A non-compete clause is a contractual restriction in an employment contract that prevents an employee from working for a competing employer for some predetermined period after their employment ends.[1] Such restrictions are ubiquitous: more than 30 million workers—or approximately 20 percent of the U.S. workforce—are required to agree to a non-compete clause as a condition to accepting employment.[2] On January 5, 2023, the Federal Trade Commission (FTC) proposed a new legislative rule that, with very limited exceptions, would prohibit, as an unfair method of competition, employers from entering or attempting to enter into a non-compete clause with an employee.[3]

The FTC's rule would have significant implications for U.S. employers and far-reaching consequences for the U.S. economy. The substance of the rule has already been the subject of profound disagreement, with proponents arguing that the provision is necessary to fight the coercive nature of such agreements,[4] and detractors warning of myriad unintended and potentially harmful economic consequences.[5]

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[1] Adam Hayes, *What Is a Non-Compete Agreement? Its purpose and requirements*, INVESTOPEDIA (Aug. 10, 2022), https://www.investopedia.com/terms/n/noncompete-agreement.asp.
[2] Evan Starr et al., *Noncompetes in the US Labor Force*, 64 CHI. J.L. & ECON. 1, 5 (2021).
[3] Non-Compete Clause Rule, 88 Fed. Reg. 3482 (Jan. 19, 2023) (to be codified if finalized at 16 CFR 910).
[4] *See, e.g.,* Editorial Board, *Banning noncompete clauses would be an economic game changer*, THE WASHINGTON POST (Feb. 4, 2023), https://www.washingtonpost.com/opinions/2023/02/04/ftc-noncompete-clauses-workers-ban/.
[5] *See, e.g.,* Eugene Scalia, *The FTC"s Breathtaking Power Grab over Noncompete Agreements*, THE WALL STREET JOURNAL (Jan. 12, 2023), https://www.wsj.com/articles/the-ftcs-breathtaking-power-grab-noncompete-agreements-rule-capital-investment-wage-gap-job-growth-compliance-11673546029.

This paper addresses the more fundamental issue of whether the FTC has the authority to promulgate the rule in the first instance, and concludes that it does not.

This paper begins with an introduction of the FTC's proposed rule. It then outlines the history of non-complete clause jurisprudence in the U.S. and demonstrates how the FTC's non-rebuttable ban on employer-employee non-compete clauses is contrary to decades of judicial decisions as to the meaning of "unfair method of competition." This paper then makes three independent arguments that the FTC lacks the power to promulgate the rule. First, Congress did not delegate "unfair methods of competition" legislative rulemaking authority to the FTC in the Federal Trade Commission Act (FTCA). Second, the FTC's power to interpret any ambiguities in the FTCA is limited by the major questions doctrine, because the issue of non-compete clauses is one of vast "political and economic significance." Finally, even assuming Congress did intend to give the FTC competition rulemaking authority, the proposed rule would contravene the nondelegation doctrine.

I. The FTC's Proposed Rule

In the proposed rule published on January 19, the FTC proposes a complete ban on the use of all non-compete clauses in employment contracts.[6] Specifically, under §910.2(a) of the proposed rule, the FTC proposes finding that it is a *per se*

> unfair method of competition for an employer to enter into or attempt to enter into a non-compete clause with a worker; maintain with a worker a non-compete clause; or represent to a worker that the worker is subject to a non-compete clause where the employer has no good faith basis to believe that the worker is subject to an enforceable non-compete clause.[7]

The rule proposes to define a non-complete clause as "a contractual term between an employer and a worker that prevents the worker from seeking or accepting employment with a

[6] 88 Fed. Reg. 3482. The rule is subject to certain exceptions that do not bear on employer-employee relationships, and that are thus outside the scope of this paper.
[7] *Id.* § 910.2(a).

person, or operating a business, after the conclusion of the worker's employment with the employer",[8] and would "generally not include other types of restrictive employment covenants—such as non-disclosure agreements ("NDAs") and client or customer nonsolicitation agreements" unless they were "so unusually broad in scope" as to "prevent a worker from seeking or accepting employment with a person or operating a business after the conclusion of the worker's employment with the employer."[9] The proposed rule would further require that existing non-compete clauses be rescinded, with a prescribed notice to the employee.[10] Finally, the rule would "supersede any State statute, regulation, order, or interpretation" to the extent the State offers less protection than would the proposed rule.[11] The rule would, however, exempt from its purview a person "who is selling a business entity or otherwise disposing of [their] ownership interest in the business entity."[12]

The Commission gave the legal authority for its rule as Section 5 and Section 6(g) of the FTCA.[13] Section 5 of the FTCA declares "unfair methods of competition" to be unlawful.[14] Section 5 further directs the Commission "to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce."[15] Section 6(g) of the FTCA authorizes the Commission to "make rules and regulations for the purpose of carrying out the provisions of" the FTCA, including the Act's prohibition of unfair methods of competition.[16]

The Commission further explained that the proposed rule was based on a "series of preliminary findings" that support its "preliminary determination" that it is "an unfair method of competition for an employer to enter into or attempt to enter into a noncompete clause with a

[8] *Id.* § 910.1(b).
[9] *Id.* at 3482
[10] *Id.* § 910.2(b).
[11] *Id.* §§ 910.1(a)(2), 910.4.
[12] *Id.* §910.3.
[13] *Id.* at 3482; *see also id.* at 3499.
[14] 15 U.S.C. § 45(a)(1).
[15] *Id.* § 45(a)(2).
[16] *Id.* § 46(g).

worker; maintain with a worker a non-compete clause; or represent to a worker that the worker is subject to a non-compete clause where the employer has no good faith basis to believe the worker is subject to an enforceable non-compete clause."[17] The Commission noted that its preliminary determination and each of its preliminary findings "are subject to further consideration in light of the comments received and the Commission's additional analysis."[18]

Among other things, the Commission made a "preliminary determination" that, by blocking workers from freely switching jobs, non-competes deprive employees of higher wages and deprive competing employers from a satisfactory talent pool.[19] The Commission additionally relied on research purporting to show "that employers' use of noncompetes to restrict workers' mobility significantly suppresses workers' wages—even for those not subject to noncompetes, or subject to noncompetes that are unenforceable under state law."[20] Ultimately the FTC estimated that the proposed rule "could increase wages by nearly $300 billion per year and expand career opportunities for about 30 million Americans."[21]

The sole dissenter to the Agency's proposed rule was Commissioner Christine S. Wilson. In her dissent, Wilson took issue with the research relied on by the Agency, and argued that there was no conclusive "evidence showing the anticompetitive effects of non-compete clauses[.]"[22] She further accused the Commission's majority of cherry-picking data that supported their narrative, while ignoring indicia suggesting that "reducing the enforceability of non-compete restrictions leads to higher prices for consumers" and to a "decrease in the quality of service[s] provided."[23] She

[17] 88 Fed. Reg. at 4399.
[18] *Id.*
[19] Press Release, FTC (Jan. 5, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition.
[20] *Id.* (quoting Elizabeth Wilkins, Director of the Office of Policy Planning).
[21] *Id.*
[22] Dissenting Statement of Commissioner Christine S. Wilson Concerning the Notice of Proposed Rulemaking for the Non-Compete Clause Rule (Jan. 5, 2023), https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/dissenting-statement-commissioner-christine-s-wilson-concerning-notice-proposed-rulemaking-non.
[23] *Id.*

resigned a few weeks later, accusing Chair Lina Khan of abuses of power and of undermining the Commission structure.[24]

Comments to the proposed rule were due by March 20, 2023. The docket establishes that over 11,000 comments were submitted.[25]

II: Non-Compete Clause Jurisprudence and Judicial Limitations on the Scope of "Unfair Methods of Competition"

(a) History of Non-Compete Clause Jurisprudence in the United States

The FTC's proposed non-compete clause rule runs counter to decades of jurisprudence holding that the legality of non-compete agreements depends on the reasonableness of the clause. Following the path set forth by the Court of King's Bench in the seminal *Mitchel v. Reynolds*,[26] U.S. state and federal courts alike have consistently held that reasonable non-compete agreements are legal and enforceable while unreasonable non-compete agreements are not.[27]

Historically, two bodies of law have governed the validity of such agreements: (1) the general law of contracts and (2) antitrust law. Courts have historically preferred to review non-compete covenants under contract law; in fact, "with rare and tangential exceptions" "federal antitrust laws … have not been applied to restrictive covenants."[28] Under the general law of contracts, courts

[24] Christine S. Wilson, *Why I'm Resigning as an FTC Commissioner*, THE WALL STREET JOURNAL (Feb. 14, 2023), https://www.wsj.com/articles/why-im-resigning-from-the-ftc-commissioner-ftc-lina-khan-regulation-rule-violation-antitrust-339f115d ("My fundamental concern with her leadership of the commission pertains to her willful disregard of congressionally imposed limits on agency jurisdiction, her defiance of legal precedent and her abuse of power to achieve desired outcomes.").
[25] 88 Fed. Reg. at Docket.
[26] Mitchel v. Reynolds, 1 P. Wms. 181 (1711).
[27] Three states have adopted statutes rendering non-compete clauses void for nearly all employees. *See* Cal. Bus. & Prof. Code sec. 16600; N.D. Cent. Code sec. 9-08-06; Okla. Stat. Ann. Tit. 15, sec. 219A. In all other 47 states, "reasonable" non-compete clauses may be enforced (though states' interpretations of "reasonableness" vary).
[28] Harvey J. Goldschmid, *Antitrust's Neglected Stepchild: A Proposal for Dealing with Restrictive Covenants Under Federal Law*, 73 COLUM. L. REV. 1193, 1193 (1973).

have found non-compete clauses to be enforceable unless they were attained, for example, via coercion or fraud, or without mutual assent.[29]

Non-compete clauses have also, on rare occasion, been challenged under Section 1 or Section 2 of the Sherman Act, or an analogous provision in a state antitrust act, but with very limited success. While Section 1 of the Sherman Act states that "*[e]ver*y contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce … is hereby declared to be illegal",[30] federal courts have not taken a literal approach to this language. Rather, they follow the Supreme Court's observation that "Congress intended to outlaw only *unreasonable* restraints"[31] and presumptively apply a "Rule of Reason" analysis, "under which antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful."[32] While courts can find certain anticompetitive conduct to be *per se* unlawful under Section 1, it is the exception and is consequently reserved for agreements "so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality."[33]

Courts have been unwilling to test non-compete covenants under the *per se* rule in part because "[s]uch covenants often serve legitimate business concerns."[34] Thus, under the fact-intensive "rule of reason" standard, plaintiffs can only prevail if they demonstrate that the restraint causes harm (such as higher prices or reduced output), and if the employer-defendant subsequently fails to demonstrate a legitimate, procompetitive justification for the restraint. This is a high burden and "[p]laintiffs [have] virtually always fail[ed] to establish such harm, with the result that a decision

[29] Alan J. Meese, *Don't Abolish Employee Noncompete Agreements*, 57 WAKE FOREST L. REV. 631, 634 (2022); *see also, e.g.,* Union Home Mortgage Corporation v. Cromer, 31 F.4th 356 (2022) (analyzing a non-compete covenant under state contract law).
[30] *Id.* (emphasis added).
[31] *See, e.g.,* State Oil Co. v. Khan, 522 U.S. 3, 10 (1997).
[32] Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006) (citing *Khan*, 522 U.S. at 10-19).
[33] National Soc. Of Professional Engineers v. United States, 435 U.S. 679, 692 (1978).
[34] Aydin Corp. v. Loral Corp, 718 F.2d 897, 900 (9th Cir. 1983) (citing Newburger, Loeb & Co., Inc. v. Gross, 563 F.2d 1057, 1082 (2d Cir. 1977)).

to assess [a non-compete] agreement under the Rule of Reason is almost a *de facto* rejection of any challenge."[35]

In its notice of proposed rulemaking, the FTC identified 17 cases in which a private plaintiff or the federal government challenged a non-compete clause under Section 1 of the Sherman Act and found that in only two were the plaintiffs "successful to some degree."[36] With respect to challenges under Section 2 of the Sherman Act —which makes it unlawful for any person to "monopolize, or attempt to monopolize" or conspire to do so—the Commission acknowledged that it was "not aware of a case in which a Section 2 claim relating to an employer's use of a non-compete clause has been successful."[37] In short, with very limited exception, the courts have concluded that non-complete clauses lie outside the scope of antitrust prohibitions.

The FTC's "preliminary determination" that the legality of non-compete covenants should no longer be analyzed under state contract law or the Sherman Act—indeed, that their legality should no longer be in a court's discretion—is consequently a significant change in antitrust jurisprudence.

(b) Judicial Limitations on the Scope of "Unfair Methods of Competition"

The Commission argues that non-compete agreements can be universally characterized as "unfair methods of competition" under Section 5 of the FTCA. The FTCA itself does not offer any definition of this term.[38] Nevertheless, while the outer boundaries of Section 5's prohibition on "unfair methods of competition" have never been delineated, it is accepted that the term as used in the FTCA includes any conduct that violates U.S. antitrust law, including, but not limited to, the

[35] *See* MEESE, *supra* note 11, at 635.
[36] 88 Fed. Reg. at 3496.
[37] *Id.*
[38] S. Rep. No. 597, at 14 (1914); *see* also E.I. du Pont de Nemours & Co. v. FTC, 729 F.2d 128, 136 (2d Cir. 1984) ("Congress' use of the vague general term 'unfair methods of competition' in § 5 without defining what is 'unfair' was deliberate.").

Sherman and Clayton Act,[39] and that the term can extend into conduct that is not forbidden by other antitrust laws.[40] Still, it has never been questioned that, while the FTC's interpretation of Section 5 is owed deference,[41] it is ultimately the courts' responsibility to determine the extent of the Section's purview.[42]

It should thus give pause that the Commission's proposed rule would ban conduct that 47 states and several federal courts have explicitly determined should be weighed by a reasonableness test, both under Section 1 of the Sherman Act and, more pertinently, Section 5 of the FTCA itself. In *Snap-on Tools v. FTC*, the FTC brought suit against Snap-on Tools Corporation, alleging that it was engaging in unfair methods of competition in violation of Section 5, by, *inter alia*, employing non-compete clauses.[43] The Seventh Circuit found for Snap-On, and held that "restrictive [non-compete] clauses … are legal unless they are unreasonable as to time or geographic scope," and that even where such restrictions *are* unreasonable, that it was "not prepared to say that it (would be) a per se violation[.]"[44]

In its notice of proposed rulemaking, the Commission sought to distinguish the Seventh Circuit opinion on the grounds that the court considered the validity of the non-compete clause only in the context of a package of termination provisions, rather than separately.[45] That attempt to dismiss the *Snap-On* decision is not convincing, in light of the court's holding that there was no evidence "indicating that Snap-On ever employed this restrictive clause in the contract for the

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[39] *See FTC* v. Ind. Fed'n of Dentists, 476 U.S. 447, 454 (1986).
[40] *Id.* at 454-5 (holding that "[t]he standard of 'unfairness' under the FTC Act is … an elusive one, encompassing not only practices that violate the … antitrust laws … but also practices that the Commission determines are against public policy for other reasons[.]" (citation omitted)).
[41] *See, e.g.,* FTC v. Texaco, Inc., 393 U.S. 223, 226 (1968); FTC v. Cement Institute, 333 U.S. 683, 720 (1948).
[42] *See* E.I. du Pont, 729 F.2d at 137 ("[I]t is the function of the court ultimately to determine the scope of the statute upon which the Commission's jurisdiction depends.") (citing Texaco, Inc., 393 U.S. at 226; FTC v. R.F. Keppel & Bro., Inc., 291 U.S. 304, 314 (1934); FTC v. Beech-Nut Packing Co., 257 U.S. 441, 453 (1922); Ger-Ro-Mar, Inc. v. FTC, 518 F.2d 33, 38 (2d Cir. 1975)).
[43] Snap-on Tools v. FTC, 321 F.2d 825, 827 (7th Cir. 1963).
[44] *Id.* at 837.
[45] 88 Fed. Reg. at 3538 n. 11.